

MILITARY RETIREMENT AND DIVORCE

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**MILITARY RETIREMENT
AND DIVORCE**

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Throughout this paper the pronoun “he” refers to the “service member” and “she” to the “service member's spouse” or “former spouse.” The law and the provisions stated herein, however, apply equally to both male and female members of the Uniformed Services and their spouses/former spouses, whether female or male. In the context used herein as far as the military retirement is concerned, all current “service member’s spouses” will be “former spouses,” thus the term “former spouse” has been employed to denominate such spouses in the divorce process, as well as in the post-divorce context.

GENERAL TERMS AND DEFINITIONS

The Monthly Basic Pay Tables refer to “monthly basic pay;” other references refer to “monthly base pay”. Throughout this paper the term “base pay” is used. However, the terms “basic pay” and “base pay” are synonymous. The 2007 Monthly Basic Pay Table is attached as **Appendix A**, but may also be found online at www.dfas.mil. This Table is applicable to all service members regardless of the service branch in which they serve.

Some of the terms, which you will need to understand if you are dealing with military retirement as an asset of the marriage, are:

PAY GRADE

“Pay grade” refers to the pay status of the service member (SM) and his overall position in the military hierarchical pecking order.

Enlisted personnel are in pay grades from E-1 through E-9. Enlisted personnel are called “enlisted” since they “enlisted” by entering or signing their name on a written contract that details the terms and length of their “enlistment.” Most people who enter the military service do so as a “recruit” and are initially assigned a pay grade of E-1. As they continue to stay alive and are promoted, they increase in pay grade, thereby being paid more money for their service. The highest “regular” enlisted pay grade is E-9. However, each Service has one, but only one, SM who temporarily holds the rank of E-10, which is not shown on most

published pay tables. This person is thus the highest enlisted person in that Service. Upon retirement, these select individuals are paid based upon the E-9 pay tables. They are only paid as E-10's while serving as the Senior Enlisted Advisor of their Service.

The term “uniformed services” is defined in 10 U.S.C. §1072 to mean “the armed forces and the Commissioned Corps of the National Oceanic and Atmospheric Administration, and of the Public Health Service.” The officer structure of the “uniformed services” is similar to that of the enlisted ranks except that there are three categories of officers. The traditional officer is commissioned upon graduation from college as an O-1, which is a Second Lieutenant in the Army, Marine Corps, and Air Force, and an Ensign in the Navy, Coast Guard, Commissioned Corps of the National Oceanic and Atmospheric Administration, and/or the Public Health Service. The highest officer pay grade is O-10. Created during World War II, these officers are authorized to wear five stars. There has been no one promoted to this rank since World War II, however, the Chief of Naval Operations, the Commandants of the Marine Corps and Coast Guard and the Chiefs of Staff of the Army and Air Force, as well as the Chairman and Vice-Chairman of the Joint Chiefs of Staff are all paid, while occupying those positions, as an O-10. The customary highest officer rank is O-9 (authorized to wear four stars), commensurate with the E-9 in the enlisted ranks.

In addition, there are two other officer categories. Each of these categories is for persons who have usually formerly served in an enlisted capacity. One is the warrant officer. These personnel are designated W-1 through W-5. W-1's are non-commissioned Warrant Officers, while W-2's through W-5's are commissioned and are called “commissioned warrant officers” and referred to as “CWO's.”

The final category of officers is commissioned officers with prior enlisted service. These personnel traditionally serve only in one particular field and/or perform specific functions, rather than general or “unrestricted” functions. In the Navy, they are called Limited Duty Officers (LDO's) (or “Mustangs” in the vernacular), indicative of the limited nature of their officer duties. On the pay scale, they are designated as O-1E through O-3E. Once they are promoted to O-4, they then fall into the “regular” commissioned officer pay scale, and because of their prior enlisted service, will usually be at the highest pay for their pay grade.

Officers can either be contract, like enlisted members, or serve at the pleasure of the President. Today, all officers, even those commissioned upon graduation from a service academy, receive a Reserve or contract commission until their “service obligation”—because of their educational contract with the Federal Government—has been completed. Then commissioned officers from all commissioning services can apply for a “regular” commission.

The Surgeon General, who holds the rank of Vice-Admiral (O-8), is appointed by the President with the “advice and consent” of the Senate and the senior official of the Public Health Service. The Senate must also approve all officer promotions to the pay grade of O-6 and above for all of the Uniformed Services pursuant to its “advice and consent” constitutional authority.

It is important to understand what a person's pay grade is so that you can enter the Monthly Basic Pay Table to determine the base pay of the SM upon divorce in order to determine what the approximate retired pay will be when it is due and payable to the SM, given the time that the parties have been married. The applicable military pay charts, as well as those for all other federal employees, can be found in volume 3 of the current year's Code of Federal Regulations (CFR) under Presidential Executive Orders. That is, the 2006 pay schedules should be delineated in a 2005 Executive Order, usually issued in December.

LONGEVITY

“Longevity” is the length of time that a SM is in the service in either an active duty or active reserve status. Military personnel receive pay increases when they get promoted to a higher pay grade as well as for staying alive and remaining in the military. The latter pay raises are termed “longevity increases.”

There is a distinction that must be drawn, however, between longevity for active duty retirement and longevity for pay purposes. The two are customarily the same, but can be different if the SM enlists in the reserves, but does not come on active duty until a later date. This is customarily the situation for doctors who enlist before or during medical school, but do not begin active duty until after they have graduated. The pay entry base date for pay purposes is the date they were “sworn in,” signed up or enlisted, however you want to term it, but their longevity for active duty retirement

purposes did not commence until the came on active duty. This distinction is important to you only as it relates to the calculation of child support and/or maintenance and the calculation of the community's interest in the SM's retired pay, if, as and when received.

Longevity is important to you and the SM because, as inferred above, it is one of the principal factors in determining a SM's base pay. The Monthly Basic Pay Table is divided, for the most part, into two-year increments. It is only important for you to know that a SM has, for instance, more than ten (10) but less than twelve (12) years of creditable service for pay purposes. Once you know this factor, in conjunction with the SM's pay grade, you can determine what the base pay of that SM is by entering the Monthly Basic Pay Table. The current, as well as past years monthly pay tables and other pay information, can be easily found on the world wide web at <http://www.dfas.mil/money/milpay/>. The DFAS home page is <http://www.dfas.mil>. As noted above, a copy of the “official” 2007 Monthly Basic Pay Table is included at the end of this paper as **Appendix A**.

An active duty member will retire for pay purposes on a date certain. He then immediately begins receiving retired pay based upon his *longevity for pay purposes* on the date of his retirement. Of course, the SM must have completed a sufficient number of creditable years and months of service to be qualified for retirement, but his retired pay at that pay grade is based upon his *longevity for pay purposes*; he will be paid retired pay at the highest longevity window he has attained at retirement.

An active duty member, upon retirement, will immediately begin receiving his monthly retired pay, with the first check being received the end of the month in which he retires. That is, the Armed Services, probably for their convenience, will retire a person on the first day of the month and the retiree does not become entitled be paid until the last day of that month. He must be alive on the last day of any month to be entitled to receive/be paid retired pay for that month.

A Reserve Component service member, on the other hand, will typically “retire” ten or more years prior to the date he begins to receive retired pay, which does not occur until he reaches age 60. Reserve Component members “retire” with a specific longevity, at least on paper. However, since a Reserve Component member

does not become *truly retired* until he begins receiving pay, he continues to accrue longevity for pay purposes. Therefore, almost every Reserve Component member, since they continue to accrue longevity for pay purposes from the date of their “retirement,” when they no longer continue to earn retirement points, until they begin “drawing retired pay,” will be paid retired pay at the “Over-26” pay scale, the maximum longevity for pay purposes. As mentioned, they do not begin receiving retired pay, however, until their sixtieth (60th) birthday and will then receive retired pay at the “Over-26” pay scale for the pay grade at which they “retired” rather than at the longevity pay scale they had attained when they transferred to the “retired list” and no longer earned, or were entitled to earn, retirement points of any kind. 10 U.S.C. §1406(b)(2).

PAY AND ALLOWANCES

The basic and most important difference between a “pay” and an “allowance” is that a *pay* is taxable to the SM while an *allowance* is usually not.

In calculating retired pay, however, even though an active duty SM is paid other “pays” and “allowances,” such as flight pay, diving pay, professional pay, submarine pay, hazardous duty or hostile fire pay, basic allowance for housing, basic allowance for subsistence and cost of living allowance, among others, base pay (BP) is the only pay or allowance that is taken into consideration in determining a person's retired pay since *retired pay* is calculated *based upon* the SM's *base pay at retirement*, or, in the case of a Reserve Component member, base pay of his retirement pay grade and longevity at the time the retired reservist begins drawing pay (age 60). Upon retirement, the SM, if receiving one or more “allowances,” loses his entitlement to receive these payments, just as he loses his entitlement to any one or more of the various “pays” he was being paid prior to retirement.

For divorce purposes, if the SM is still on active duty, retired pay is calculated based upon the SM's base pay for his pay grade and longevity on the date of divorce.

There are presently three military retired pay calculation plans or formulas: the **Final Pay Plan** (50% of the base pay (the SM is receiving at retirement) after 20 years of service plus 2.5% for each additional year up to 75%) for members entering the service prior to September 8, 1980 (10 U.S.C. §1401.); the **High-three Plan** (50% of the average of the high-three years (36 months) of the SM's base pay) after 20 years of service

plus 2.5% for each additional year up to 75%) for members entering the service between September 8, 1980 and July 31, 1986 (10 U.S.C. §§1401, 1407.); and the **Military Retirement Reform Act (MRRA)**, also known as **REDUX** (40% of the average of the high-three years (36 months) of the SM's base pay) after 20 years of service (that is, 2.5 % for each year of creditable service, less 1% for each year of creditable service less than 30 and the SM is under 62 years of age and less an additional 1/12 of 1% for each month, after counting all full years, less than a full year, up to a maximum of 75% for 30 or more years.) for members entering the service after July 31, 1986. Additionally, under REDUX, annual COLAs for retirees are one percentage point less than inflation, as measured by the Consumer Price Index (CPI). Then at age 62, two adjustments are made: (1) the amount of retired pay is adjusted and set to the value it would have been if full COLAs were provided, then the COLAs continue at 1% below the CPI; and (2) retired pay is recalculated under a new formula that restores the value of the first 20 years of service to correspond with what it would have been under the High-three Plan with each additional year of service being worth 2.5% up to the 75% maximum. REDUX was repealed, in general, by the 1999 Congress. However, personnel to whom it applied and elected to participate in the “REDUX retirement plan” got paid a lump sum payment—\$30,000.00—at the time election was required, that is, at their 15th year. At that time they were also required to sign up for another 5 years and were then limited to the REDUX retirement plan provisions, which is basically 40% at 20 years of the high-3 years of base pay plus the COLA restrictions specified above. (10 U.S.C. §§1401, 1409, 1410.)

REDUX was repealed because it was not a “good deal” and had an adverse effect on recruiting and the High-Three Plan was reinstated. It, the H3PB, now applies to all personnel who entered military service after September 8, 1980.

PAY ENTRY BASE DATE (PEBD)

It is important to know the SM's Pay Entry Base Date (PEBD) since that is the date from which all longevity pay increases are determined. For instance, if a SM's Pay Entry Base Date is June 1, 1992, his last longevity pay increase occurred on June 1, 2006. On that occasion, he went “over 14 years.” He will receive his next longevity increase on June 1, 2008 when he will “go over 16.” Thus, for the purpose of

determining a finite base pay figure from which to determine estimated post-retired pay, the Pay Entry Base Date, or Adjusted Pay Entry Base Date (APEBD) in the case of persons with “broken service,” is an important date and will be listed on the Leave & Earnings Statement (LES) for active duty SMs as well as for Reserve Component members drilling in a pay status.

If the SM has had “broken service,” it is important for you to determine what the inclusive dates of the various service periods and types of service (active, active reserve, inactive reserve) to be able to determine which of the service periods were community and which were separate property. A SM has “broken service” if he enters active duty, separates for over twenty-four (24) hours (it will usually be for a longer period) and then re-enters active duty or a reserve component. Upon re-entering active duty, he will be given an APEBD for retirement calculation purposes. It is not a significant problem in determining the community and separate property service periods if this is all he does. Usually, however, the problem is complicated because the member, upon separation from active duty, will join a reserve unit and begin accumulating retirement points that, upon his return to active duty, will, in part, give him not only longevity for pay purposes, but, in a small part, additional creditable service to entitle him to an active duty retirement. Active duty retirements are authorized pursuant to 10 U.S.C. §1405.

DATE INITIALLY ENTERED MILITARY SERVICE (DIEMS)

This date is used SOLELY to indicate which retirement plan a member is under. For those members with a DIEMS date prior to September 8, 1980, they are under the FINAL PAY retirement plan. For those members with a DIEMS date of September 8, 1980 through July 31, 1986, they are under the HIGH-3 retirement plan. For those members with a DIEMS date of August 1, 1986 or later, they were initially under the REDUX retirement plan. This was changed by law in October 2000, when they were placed under the HIGH-3 plan, with the OPTION to return to the REDUX plan. In consideration of making this election, they become entitled to a \$30,000 Career Service Bonus. The data in this block comes from PERSCOM. DFAS is not responsible for the accuracy of this data. If a member feels that the DIEMS date shown in this block is erroneous, they must see their local servicing Personnel Office for corrective action.

HIGH-THREE BASE PAY

As important as it is to understand and know the member’s PEBD or APEBD, for SM’s entering the service, active or reserve, after September 8, 1980, which includes almost everyone at this juncture, it is also just as important to have the SM’s last thirty-six (36) months of LES to be able to determine what his High-Three Base Pay (H3BP) on the date of divorce is. It is best to have all thirty-six since, invariably, you will have a partial month to apportion since most divorces are not granted on the first, fifteenth or the last day of the month. By having all thirty-six LESs, you will be able to more efficiently and equitably apportion the partial month for the month of divorce and the partial month three years ago (the 36th month). You can average these numbers once obtained or create a spreadsheet that will calculate this information for you once you have inputted the necessary information from the LESs. This H3BP spreadsheet can then be a trial exhibit to show mathematically what the active duty and/or reserve SM’s hypothetical base pay on the date of divorce is. This is more especially important if you represent the SM in the author’s opinion. As hereinafter used in this paper, base pay or base pay at divorce or base pay at retirement should be read to mean the applicable base pay, that is, either final pay or H3BP.

Calculating a Reservist’s H3BP

This is also what you would do if calculating the retired pay of a Reservist/Guardsman, except that you would have to use the Monthly Base Pay Chart to determine the applicable H3BP since a Reservist is only paid for part-time work, and usually for only “four drill periods”, which is four-days pay. The active duty member gets paid for a full 30-day month so you can use his LESs, but the Reservist does not so, as stated, you will either have to divide the number of days’ pay shown on the reserve LES and then, having one day’s pay, multiply that by thirty (30) to get the month’s base pay or simply use the amount stated on the Monthly Base Pay Chart for his pay grade and longevity over the preceding 36-month period. Thus, for a Reservist, you will want to introduce at least one reserve LES and the applicable pay charts for the years necessary to prove the pay spanning 36 months, either three or four.

Two separate H3BP spreadsheet/exhibit exemplars are included at **Appendix B**.

Without this calculation having been made and the amount entered into the divorce decree as the H3BP on the date of divorce, DFAS will not honor the order making a hypothetical division award in accordance with Texas law—*Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983), and its progeny—that limits the award to the former spouse (FS) of a percentage of the SM's retired pay on the date of divorce at the pay grade and longevity he has attained on the date of divorce. Depending on which spouse you represent and how the decree is worded on this issue, it will probably be necessary to “clarify” the Military Retirement Order (MRO) after the SM actually retires.

ANNIVERSARY DATE/ANNIVERSARY YEAR

The anniversary date is the basis for computing reserve service time and for retirement participation recording. An anniversary date is established whenever a member “enters” reserve service. Once established, the anniversary date does not change. Transfers between Reserve Components (USAR, USNR, USMCR, USCGR, USAFR, Texas Army/Air National Guard, etc.) and changes of status (active/inactive) within a component do not change the anniversary date.

A member who affiliated with a Reserve Component on October 1 of a year has an anniversary date of October 1. The anniversary year begins on the anniversary date, and a new anniversary year begins each year on the same date. The concept of “anniversary date” does not apply to “regular” active duty service, but is analogous somewhat to the active duty member's Pay Entry Base Date.

RETIREMENT POINTS

A Reserve Component member's retired pay is determined by the retirement service points he accumulates during his military service, both his active duty and his reserve participation. While active duty SMs earn their retirement expectancy based upon the number of years they have served, Reserve Component members earn their retirement expectancy based upon the number of retirement points they accumulate prior to retirement. In addition, in order to retire, Reserve Component members must also serve at least 20 “good years.” It may, and often does, take a Reserve Component member more than 20 calendar years to obtain 20 “good years” for retirement eligibility.

Good years and retirement points are determined as follows:

A member of the reserve in an eligible status (ready reserve, reserve on active duty, or on inactive duty but has a service obligation) may earn retirement points by any one of the following methods:

1. One point is credited for each day of active duty or annual training including travel time. That is, if a reservist is on active duty or is on annual training (AT) or any other temporary active duty, he will earn one retirement point for every day of service, regardless of any other retirement point generating activity he may perform, except that the member may not receive more than 365 retirement points (or 366 in a Leap Year) in any anniversary year.
2. A reservist who is in a drilling status (ready reserve) is credited with one point for each authorized drill attended, whether in a pay or non-pay status. Usually, the member receives four retirement points per month for completing two days of drill. These drills are usually divided into four drills per weekend.
3. The reservist can also obtain points by satisfactorily completing authorized correspondence courses. The point credit received varies with the course successfully completed.
4. The reservist is also awarded fifteen (15) gratuitous retirement points each anniversary year if in an eligible status. He earns or is awarded these points regardless of whether he earns any other points and/or completes a “good year.”

A “good year” or a “qualifying year” is any “anniversary year” during which the Reserve Component member earns a total of 50 retirement points from all possible sources. 10 U.S.C. §§12732-33.

When the reservist cannot qualify for a “good year,” the points earned that year still accrue to the member's benefit. That is, the member still earns the 15 gratuitous points whether he attends any drills or not. However, as noted above, he must acquire 20 “good years” before he can become retirement eligible and thus be entitled to receive retired pay at age 60. 10 U.S.C. §§12731-33. *Bloomer v. Bloomer*, 927 S.W.2d 118 (Tex.App.—Houston [1st Dist.] 1996, writ denied); *In Re Marriage of Poppe*, 97 Cal.App.3d 1, 158 Cal.Rptr. 500 (1979).

These point accumulations are posted annually, and each SM is sent an Annual Retirement Point Record approximately three to six months after the end of the Reserve Component member's "anniversary year." Upon review of an Annual Retirement Point Record, you will note that the monthly drill credit is listed under "Inactive Points." The active duty (annual training (AT) or additional duty training (ADT)) points are listed under the term "Active Points." You should also note that the active points are accumulated on a day-for-day basis, that is, one point for each day of active duty performed. 10 U.S.C. §§12732-33.

Once the total number of points earned by the Reserve Component member is determined, divide that number by 360 to obtain the reserve equivalent to the number of years that an active duty member has accrued toward retirement. This "360" number is used because that is an adjustment which has been determined by Congress to ostensibly equalize the reservist's "part-time" participation with that of an active duty member's "full-time" participation. 10 U.S.C. §12733. *In Re Marriage of Poppe, supra*.

To determine a Reserve Component member's present retired pay entitlement, they/you can go to <https://www.hrc.army.mil/site/reserve/soldierservices/retirement/retirementcalc.asp> and access the "Calculate Retired Pay Application" that the Army has established to allow Army Reserve soldiers (retiring at age 60) to estimate their retirement pay.

MILITARY RETIRED PAY BENCHMARKS
YOU NEED TO KNOW
TO CALCULATE RETIRED PAY

The following are benchmarks you must know in order to calculate military retired pay for active duty or Reserve Component members, upon divorce:

A. Active Duty:

1. Number of months married while the SM is on active duty (Months married active duty).
2. Number of complete years of creditable service ("good years") plus each full month of service that is in addition to the number of full years of service, credited as 1/12th of a year per full month of service accumulated by the active duty SM on the date of divorce or when member retires, as applicable (Years of creditable service). 10 U.S.C. §1405.

For divorce purposes, Texas case law implements this practice by comparing the number of months of marriage while on active duty (Months married active duty) with the total number of months of the member's creditable service for retirement (Months of creditable service). *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977). *Cf. Parliament v. Parliament*, 860 S.W.2d 144 (Tex.App.—San Antonio 1993, writ refused n.r.e.).

3. 2 1/2% (0.025), which is the percentage of base pay which a SM accrues toward retirement for every complete year and complete month of creditable service, that is, every "good year" and "good month" which the SM earns or successfully completes. 10 U.S.C. §§1401, 1406. The completion of a successful year for an active duty SM is on the anniversary of his Pay Entry Base Date.

4. Pay grade of SM.

5. Base pay (that is, the high 36-month average of BP) of SM at the SM's pay grade and longevity on date of divorce or when SM retired, as applicable. 10 U.S.C. §§1406, 1407. *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987).

6. Percentage of community interest in SM's retired pay awarded to SM's spouse (Percentage awarded spouse).

B. Reserve Component:

1. Number of retirement points earned while married (Retirement points earned married).

2. Total number of retirement points earned by SM on date of divorce or when member retired, as applicable (Total retirement points earned).

For divorce purposes, Texas and California courts, when they consider this point, should compare the number of retirement points earned while married (Retirement points earned married) with the total number of retirement points earned by the SM on the date of divorce or when the SM retired (Retirement points earned). *Bloomer, supra*; *In Re Marriage of Poppe, supra*.

3. 2 1/2% (0.025), which is the percentage of base pay that a SM accrues toward retirement for each 360 retirement points accrued. Of course, although not relevant to the calculation of retired pay, the reservist must, nevertheless, have 20 "good years" to be

eligible for retired pay at age 60. 10 U.S.C. §§12731-33, 12739.

4. Pay grade of SM.
5. Base pay (or high 36-month average of BP) of SM at the SM's pay grade and longevity on date of divorce or when SM retired, as applicable. 10 U.S.C. §§1406, 1407. *Grier v. Grier, supra.*
6. Percentage of community interest in SM's retired pay awarded to service member's spouse (Percentage awarded spouse).

COST-OF-LIVING ADJUSTMENT (COLA)

COLAs are established by the Congress from time to time, usually annually, and have always been increases, although the Congress certainly has the authority to also order a decrease if it determines that the cost-of-living has decreased.

With respect to military retirees, the COLA is based on consumer price index (CPI) increases and “traditionally” become effective on December 1, with any increase first appearing in the retiree’s pay check that is actually received in January. 10 U.S.C. §1401a(b)(1). In 1993, Congress changed the scheme such that, although COLA'S are “effective” on December 1 of each year, for retirees in 1994, the initial month for the increase was March 1994, which increase would be shown in the retired pay received on or about April 1, 1994, and for fiscal years 1995 through 1998, the increase was to be postponed to September, the pay being received in the October pay check. *Id.* at (b)(2)(B). Congress, however, returned the payment date for the annual COLA to the April check for 1996, and, for fiscal year 1997, returned it to the January check.

With respect to active duty personnel, their COLA is established annually by Congress as part of the Budget legislation and becomes effective in January of each year, being promulgated through an Executive Order, which is usually issued in the month of December.

A SM who retires in one year does not necessarily receive the full COLA given for the next year. He should only receive a statutorily set pro-rata portion of the retiree COLA for that year, the pro rata portion applicable depending on when in the year he retires. *See* 10 U.S.C. §1401a(e).

LEAVE AND EARNINGS STATEMENT (LES)

Leave and Earnings Statement (LES) is the military payroll voucher that explains to the SM what he is being paid, what deductions are being made from his pay and what they go to pay, including his elective allotments. A plethora of information can be found on the DFAS Military Pay website at <http://www.mil/dfas/militarypay.html>. Additional information about the SM’s pay and allowances, as well as how to read a LES can be found at the DFAS Military Pay: News & Information page: <http://www.mil/dfas/militarypay/newinformation.html> or at the *MyPay* website: <https://mypay.dfas.mil/mypay.aspx>. Attached as **Appendix C** is a primer explaining “How to read an active duty Army, Navy or Air Force Leave and Earning Statement” downloaded from the referenced DFAS website. I guess that the Marine Corps has to have their own explanatory primer just for their personnel since they have a separate primer on the DFAS website. It is attached as **Appendix D**.

Apparently, the military services have gone to one pay statement and have done away with the Reserve Earnings Statement (RES) since one could not be found, but a primer on reading a Reserve/National Guard LES was listed. Although all of the listed “How to read” documents appear to be identical, there are several to choose from. The Reserve/National Guard instruction is attached as **Appendix E**.

The *MyPay* site is also where the SM can go to log on and view his current (as well as past) LES, as well as make changes or modifications to his pay. Of course, it is a secure website, so he will have to have a PIN (password) to enter the secure portion of the site where he will then be able to make his pay changes. Allotments for such things as bank loan payments, alimony/maintenance and child support payments, increasing or decreasing his income tax withholding, etc., can all be made conveniently by the SM without ever leaving his office or home.

RETIREE ACCOUNT STATEMENT (RAS)

The Retiree Account Statement (RAS), DFAS-CL 7220/148 (Rev. 3-01), is the retiree's equivalent of the active duty member's LES and of the Reserve Component member's LES. If the SM is retired, you should obtain a copy of the most recent statement from the SM, whether he is your client or not. If he is not your client, then make sure you obtain it through

discovery, whether formal or informal. The retiree will usually only receive one such statement per year—when the COLA is “applied”—but will also receive one each time he makes a change in the deductions being withheld from his pay. That is, if he changes any of this allotments or changes his income tax withholding or the VA changes the amount of his entitlement, etc., each change initiated during a different pay cycle will cause DFAS to send him a RAS that reflects the “former pay information” and his “new pay information” along with identifying the date the “new pay information” will become effective. A specimen RAS is included at the end of this paper as **Appendix F**.

CONCURRENT RECEIPT OF MILITARY RETIRED PAY AND DISABILITY PAY (CRDP)

For retired pay payments made after January 1, 2004, the law was changed to allow certain military retirees (those having a fifty percent (50%) disability rating or higher from the VA) to receive both disability compensation payments from the VA, as well as all of their military retired pay from the DFAS. The law, commonly referred to as “concurrent receipt,” will be phased in over 10 years, so that, at the present, it is not a dollar for dollar provision. SMs with a 50% disability will get \$100 more each month, those with 60% will get \$125, those with 70% will get \$250, those with 80% will get \$350, those with 90% will get \$500 and those with 100% disability will get \$750. Over the ten years, these amounts will increase until they are equivalent to the amount waived; that is, in 2013, the SM with 50% or more of VA disability compensation entitlement for which he was required to waived a equal dollar amount of non-disability retired pay, will be receiving all of his non-disability retired pay and **concurrently receive** all of his VA disability compensation entitlement as well. This change in the law will allow former spouses of the retirees and recipients of child support and/or alimony to begin receiving more of their entitlement since the VA disability that was deducted from the SM’s gross retired pay to arrive at DRP will no longer be a factor to the extent the SM has a 50% VA disability rating or higher. The statute that details the terms of the concurrent receipt is 10 U.S.C. §1414 and has been attached as **Appendix G**.

Former Spouses Entitled to Payments under the USFSPA should send DFAS Notice to “restart” payments

In cases where the DFAS has a complete application on file for the FS, but the FS has not received any payments when “her” SM retiree's has been rated by the VA as being 100% disabled, or the FS has received partial payments due to the SM retiree being partially disabled, the FS will need to send a written request to the DFAS, with the FS’s current payment address, to restart the FS’s payments.

COMBAT RELATED SPECIAL COMPENSATION (CRSC)

CRSC, 10 U.S.C. §1413a, is a recent entitlement program passed by the Congress that may entitles qualifying SMs to additional funds that are to compensate him for the reduction of his military retired pay due to the receipt of VA compensation (also known as the VA waiver). With CRSC, the SM can receive either partial or full concurrent receipt of his military retirement pay and his VA disability compensation.

The amount of a qualifying SM’s entitlement to CRSC is based on the combined disability rating of combat-related disabilities as determined by the SM’s branch of service. Only combat-related disabilities for which the SM actually receives VA disability compensation will be considered. A retroactive VA adjustment will not normally result in a retroactive CRSC payment.

The following formula is what the DFAS uses to determine a SM’s combined VA rating of multiple combat-related disabilities:

- (1) Subtract each disability percent from 100% to obtain the remaining efficiencies.
- (2) Multiply the remaining efficiencies together.
- (3) Subtract the result from 100%.
- (4) Round to the nearest 10%, round up for 5% or above.

Example: Using three disabilities of 50%, 40% and 30% ...

- (1) $[100 - 50 = 50\%] / [100 - 40 = 60\%] / [100 - 30 = 70\%]$
- (2) $50\% \times 60\% \times 70\% = 21\%$
- (3) $100\% - 21\% = 79\%$
- (4) 79% rounds up to an 80% combined disability.

Additional information on CRSC can be located on the DFAS website at:

<http://www.defenselink.mil/dfas/retiredpay/combat-relatedspecialcompensationcrsc.html>

The defining statute, 10 U.S.C. §1413a, is attached as **Appendix H**.

WHAT YOU NEED TO PROVE AT TRIAL

ACTIVE DUTY MEMBER

The retired pay of an active duty SM is clearly subject to division by the divorce court. In preparing for trial, the attorney for each party should plan to put into evidence the following information:

1. The SM's PEBD.
2. The date of the parties' marriage.
3. The SM's pay grade (rank) at divorce.
4. The number of months (or years and months) the SM has been on active duty at the time of divorce (longevity).
5. The number of months (or years and months) the parties have been married while the SM has been on active duty at divorce.
6. The SM's H3BP at divorce.
7. Your calculation (percentage and/or dollar amount), based upon the above, of the community estate's interest in the SM's hypothecated retired pay at divorce subject to being divided by the Court.
8. Compliance with the Servicemembers Civil Relief Act (SCRA) (signed into law on December 19, 2003) f/k/a Soldiers and Sailors Civil Relief Act (SSCRA).
9. The SM's retired pay will be annually affected by COLAs. If you represent the FS, you will want to be entitled to COLAs attributable to her share.

Most of this information is available on the SM's LES. You should therefore introduce at least his most current LES into evidence. It is recommended, however, that you also prepare an exhibit of your own creation, in addition to introducing one or more LES's, which summarizes your contentions and have your client testify to your/those calculations.

Since all SMs [save and except those who currently have over 26 years of longevity for pay purposes] are H3BP members, you will want to obtain all of the active duty SM's LESs for the thirty-six months prior to the divorce to introduce into evidence. It is also recommended that you use these 36 LESs to prepare a trial exhibit similar to the two shown on **Appendix C** to determine the SM's H3BP upon divorce. You can then try to get opposing counsel to enter into a written stipulation or Rule 11 Agreement with you that your or his/her calculation of the H3BP is correct. Of course, the Stipulation/Rule 11 Agreement and/or the exhibit must still be introduced and admitted into evidence during the trial of the case. It is imperative, in the event of an appeal, that the H3BP information is in the record, whether it is a divorce and/or a post-divorce proceeding.

RETIRED ACTIVE DUTY MEMBER

When a retired active duty member is involved, you do not have as much to prove since he is already retired and the various benchmarks that go into determining the community estate's interest in the retired pay are fixed. Thus, in this instance, all you need to ensure is in evidence and in the court reporter's record are the following:

1. The SM's Pay Entry Base Date.
2. The date of the parties' marriage.
3. The date of the SM's retirement.
4. The number of months (or years and months) the SM has been on active duty at the time of retirement (longevity).
5. The number of months (or years and months) the parties had been married while the SM was on active duty at the time of his retirement.
6. The SM's current retired pay. You should introduce a copy of his most recent RAS, which reflects his current retired pay.
7. Your calculation (percentage and/or dollar amount), based upon the above, of the community estate's interest in the SM's retired pay subject to being divided by the Court.

8. The SM's retired pay will be annually affected by COLAs. If you represent the FS, you will want her to be entitled to COLAs attributable to her share.

It is not necessary to prove compliance with the SCRA when the SM is not on active duty since that is the only category of SM it protects. You should ensure, however, that the record clearly reflects that the SM is retired at the time the divorce was filed and/or finalized and that compliance with the SCRA is therefore not applicable to the proceeding.

Although not a necessary element of proof, it is nevertheless suggested that, as part of your "routine" evidentiary proof, you also include the SM's pay grade (rank) at the time of his retirement.

RESERVE COMPONENT/NATIONAL GUARD MEMBER

Since retired pay earned by a Reserve Component member is also subject to division by the divorce court, one of the fact issues which should be presented to the trial court for determination is the number of retirement points earned by the Reserve Component member before and during the marriage, irrespective of whether the points were earned in a pay or a non-pay status or whether the points earned were "inactive" or "active" points. There is no distinction made for retirement purposes, or, for that matter, for the purposes of the USFSPA, as to how the points were earned or what "kind of points" they are (pay or non-pay, inactive or active). *See* 10 U.S.C. §12731 et seq. *See also Bloomer v. Bloomer, supra; In Re Marriage of Poppe, supra.* Generally, it will be incumbent upon the SM's attorney to present this "retirement point" evidence to the trial court since the trial court probably will (or at least may) use the traditional active duty division concept—the "time" or "apportionment" rule (*i.e., Taggart v. Taggart, supra.*). This is clearly not the correct "rule" to use. *In Re Marriage of Poppe, supra*, very concisely and cogently explains the difference between reserve and active duty retirement, rejecting the "time rule" espoused by the FS's attorney in that case. The only other reported cases of which the author is aware which directly and correctly addresses the division of reserve retirement, other than *Bloomer v. Bloomer, supra*, are *Woodson v. Saldana*, 165 Md.App.480, 885 A.2d 907 (2005); *Faulkner v. Goldfuss*, 46 P.3d 993 (Alaska 2002) and each one relies upon and either cites or quotes from the *Poppe* case.

Of course, the FS's attorney will most likely suggest that the trial court apply *Taggart* as occurred in

Bloomer, either knowingly to benefit his client or merely in utter ignorance of how reserve retirement is calculated, the latter more often being the case than the former. Thus, **the attorney representing the Reserve Component member should not go to court without the *Bloomer* and *Poppe* opinions with him.** For your convenience, the *Bloomer* opinion is attached as **Appendix I** and the *Poppe* opinion as **Appendix J.**

In general, a reservist falls into three categories for the purpose of determining whether reserve retirement is truly an asset to be divided. These categories are as follows:

1. Currently in active reserve status (and anticipating earning a reserve retirement entitlement at age 60).
2. Retired having completed 20 qualifying years but not yet attained age 60 (called a "Gray Area Retiree").
3. Retired and actually drawing reserve retired pay (is age 60 or over).

Regardless of whether you represent the SM or his spouse, you must know the category in which the SM fits to properly evaluate the "value" of the retirement benefit. Obviously, if the SM is in category 2 or 3, the value of the retirement is much more apparent than if the SM is still in category 1. Also, the value of the retirement upon divorce of a SM in category 1 depends upon how many retirement points he has earned during marriage and how many "good years" he has earned at the time of divorce, as well as how many more "good years" he must accumulate before becoming retirement eligible.

You will also want to "work out" the numbers to see what is most beneficial for your client. That is, if you represent the SM, it may be more advantageous to use the "months of service" formula (*Taggart*) rather than the "points earned" formula (*Bloomer* and *Poppe*) if very little of the total retirement points were earned before marriage and/or will be earned after marriage. In this situation, a smaller percentage of the retired pay might be awarded to the FS by using the time or *Taggart* formula than if you use the reserve "retirement point or *Bloomer/Poppe* formula. Thus, know what is best for your client. If the reserve formula is the most advantageous, argue for it, or "graciously concede" that the "time formula" would be *best* for the parties or the easiest for everyone to understand and/or to implement.

At this point, and in spite of the immediate foregoing paragraph, it has recently come to my attention that the DFAS is now moving into the 21st Century as it relates to reserve retired pay calculation on divorce and is reportedly not honoring division orders that use “months of service” formulae to divide a Reservist’s retirement and are requiring them to be calculated based upon points as in the *Bloomer/Poppe* formula. ***Forewarned is forearmed.***

In any event, in preparing for trial, the attorney for each party should plan to put into evidence the following information:

1. Both the SM’s:
 - a. Pay Entry Base Date; and,
 - b. Reserve Anniversary Date.
2. The date of the parties’ marriage.
3. The SM’s pay grade (rank) at divorce.
4. Both the:
 - a. Number of months (or years and months) the SM has accrued for pay purposes duty at the time of divorce (longevity); and,
 - b. Number of retirement points the SM has earned or accumulated at the time of divorce.
5. Both the:
 - a. Number of months (or years and months) the parties have been married while the SM has been in the active Reserves at divorce.
 - b. Number of retirement points the SM has earned or accumulated during the parties’ marriage at the time of divorce.
6. The SM’s H3BP at divorce if he were on active duty.
7. Your calculation (percentage and/or dollar amount), based upon the above, of the community estate’s interest in the SM’s hypothecated retired pay at divorce subject to being divided by the Court (you choosing the correct “retirement point” (*Bloomer/Poppe*) formula or using the “time” (*Taggart*))

formula, depending on which best suits your client’s situation.).

8. Compliance with the SCRA if the Reserve Component member is then on active duty; otherwise, compliance is not applicable.
9. The SM’s retired pay will be annually affected by COLAs. If you represent the FS, you will want her to be entitled to COLAs attributable to her share.

As in the case of the active duty member, most of this information is available on the Reserve Component member’s LES. You should therefore introduce at least his most current LES into evidence. Also, as in the case of the active duty member, but even more strongly if you represent the Reserve Component member, it is recommended that you also prepare an exhibit of your own creation that summarizes your contentions and have your client testify to your/those calculations. This is especially true for a summary of the Reserve Component member’s retirement point history upon which you base your calculations of the community portion of the retirement points, and, as a result the FS’s share or interest in the hypothecated retired pay. An example of such a retirement point summary trial exhibit is attached as **Appendix K**.

**RETIRED RESERVE
COMPONENT/NATIONAL GUARD MEMBER**

When a retired Reserve Component member is involved, as with a retired active duty SM, you do not have as much to prove since he is already retired and the various benchmarks that go into determining the community estate’s interest in the retired pay is fixed. Thus, in this instance, all you need to ensure is in the record are the following:

1. Both the SM’s:
 - a. Pay Entry Base Date; and,
 - b. Anniversary Date.
2. The date of the parties’ marriage.
3. The date of retirement and/or the date of his *de facto* retirement, that is, the date of his transfer to the “Inactive Reserve.” This is the date he stopped earning retirement points and was no longer a drilling reservist.

4. Both the:

a. Number of months (or years and months) the SM has accrued for pay purposes at the time of divorce (longevity); and,

b. Number of retirement points the SM has earned or accumulated at the time of his retirement (the number upon which his retired pay is based).

5. Both the:

a. Number of months (or years and months) the parties have been married while the SM has been in the active Reserves at the time of his retirement; and,

b. Number of retirement points the SM has earned or accumulated during the parties' marriage at the time of divorce.

6. The SM's current retired pay. You should introduce a copy of his most recent RAS, which reflects his current retired pay.

7. Your calculation (percentage and/or dollar amount), based upon the above, of the community estate's interest in the SM's hypothecated retired pay at divorce subject to being divided by the Court (you choosing the correct "retirement point" (*Bloomer/Poppe*) formula or using the "time" (*Taggart*) formula, depending on which best suits your client's situation.).

8. The SM's retired pay will be annually affected by COLAs. If you represent the FS, you will want her to be entitled to COLAs attributable to her share.

As noted above, it is not necessary to prove compliance with the SCRA when the Reserve Component member is retired. As a precaution, however, ensure that the record clearly reflects that the Reserve Component SM is retired at the time the divorce was filed and/or finalized and that compliance with the SCRA is therefore not applicable to the proceeding.

Although not a necessary element of proof, it is nevertheless suggested that as part of your "routine" evidentiary proof that you also include the SM's pay grade (rank) at the time of his retirement.

MISCELLANEOUS

Most, if not all, of this information will, or should, be admitted into evidence by stipulation or agreement of the parties or without objection. Once you get this information into evidence, you have covered all the bases you need to establish the correct entitlement of both parties, regardless of which one you represent. You have also protected yourself in the event of an appeal regardless of whether you become the Appellant or the Appellee on this issue.

RESERVE RETIREES MUST APPLY FOR RETIRED PAY

Even though a SM may have met all of the requisites to be entitled to receive retired pay as an active duty or a Reserve Component retiree, before the Defense Finance and Accounting Service (DFAS) will make payments to him (and to the FS if eligible for direct payments), *the SM retiree must apply to receive retired pay.* 10 U.S.C. §12731. A reservist, however, is not eligible to receive retired pay until he reaches age 60. The DFAS Cleveland Center recommends applying at least 90 days prior to eligibility for receipt of pay so that the retiree and/or FS will receive his/her/their first paycheck on time.

Although it is highly unlikely that a Reserve Component SM will not apply to receive the retired pay for which he spent so many weekends and two week active duties for training, you may want to consider including language in your decree compelling the SM to apply for retirement when due.

FINANCE CENTERS

In previous regulations promulgated by the various services, the Secretary of the Service (Army/Navy/Air Force/Transportation (Coast Guard)) (frequently referred to as the "Service Secretary" in divorce decrees, partition orders, DRO's, etc.) has been replaced with the Defense Finance and Accounting Service (DFAS). Formerly the Navy Finance Center, all retiree pay is handled out of and by the DFAS Cleveland Center for all service branches, and it is the **only** finance center where you can obtain information on retired pay payable to a SM or a FS. Thus, in general, family law practitioners representing FSs, regardless of the SM's branch of service, only have to deal with the Cleveland [Ohio] Center regarding retired pay and/or the London [Kentucky] Center regarding Survivor's Benefit Plan (SBP) matters. The

only exceptions are those of Coast Guard members whose retired pay matters are handled by their Pay and Personnel Center in Topeka, Kansas and Public Health Service officers, whose retired pay matters are handled by the Department of Health and Human Services in Washington, D.C.

Wage withholding orders still need to be sent to the appropriate DFAS Center for the SM's branch to effect garnishment for child support or alimony, however, if that is a consideration. The agents for service of these orders and their addresses, phone and fax numbers are identified in 5 CFR Appendix A to Part 581 and, for your convenience, are listed in **Appendix L** at the end of this paper.

Although not applicable at present, the Cleveland Center was also responsible for processing all "early out" programs which allowed the SM to receive separation pay for getting out of the service in lieu of risking involuntary separation while trying to qualify for retired pay at 20 years.

TEMPORARY EARLY RETIREMENT ACT (TERA)

Also not presently applicable, the Cleveland Center was additionally responsible for the administration of all retirees retired under a temporary program which allowed SMs having at least 15 years of service, but not 20 years of service, to retire with "full pay and benefits" based upon their longevity at the time of their "early retirement," pursuant to Temporary Early Retirement Act (TERA), 10 U.S.C. §1293. Its Reserve Component equivalent is found at 10 U.S.C. §12731a. A copy of TERA can be found at **Appendix M**, while the Reserve Component provision is attached as **Appendix N**.

SM's who availed themselves of this "early retirement" program, TERA, and retired in less than 20 years, receive less than the "straight formula" amount each month, that is, since they did not serve a full 20 years, they do not get the retired pay for having served 20 years. Additionally, since the SM will be receiving retired pay for a longer period of time, the DFAS applies a present value discount factor to the otherwise "straight retirement formula." This TERA provision, 10 U.S.C. §1293, provides that the SM receiving "early retirement" will have his retired pay reduced by one-twelfth (1/12) of one percent (1%) or 0.08333% for each month his longevity for retirement purposes is less than 240 months (twenty (20) years). Thus, if he

retires with only 191 months, 49 months less than 240, his fifty percent (50%) retirement to which he would be entitled upon having 20 years of creditable service for retirement will be reduced by $49 \times .000833$, which is 4.08%. This results in him receiving 45.92% of his H3BP rather than 50% of it.

Although we can certainly see why it is important for the SM to know why he is not receiving the same amount as someone retiring with 20 or more years of service and how his retired pay will be initially calculated, why is this important to you as a Family Law practitioner? The answer is because we are charged, pursuant to the Family Code and the case law interpreting it, as well as cases like *Berry* (1983), to value an asset at the time of divorce, that is, to determine its "fair market value" on the date of divorce. Thus, TERA is important to us since most of our military cases involve SMs who have not attained 20 years of creditable service (20 good years for Reserve Component members), and the Federal Government has provided us with a simple actuarial tool to determine the Fair Market Value of the military retirement benefit of a SM who has less than 20 years of creditable service for retirement purposes.

In representing SMs who have less than 20 years of creditable service, you should also go to court with a copy of TERA so you can, if necessary, prove to the Court—since it is a federal statute, it should take judicial notice of TERA if you request it to be done—what TERA is and its affect upon the valuation of the community interest of your SM client's retired pay entitlement.

RETIRED PAY TERMINATES ON DEATH OR OTHER COURT-ORDERED EVENT

10 U.S.C. 1408(d)(4) provides as follows:

Payments from the disposable retired pay of a member pursuant to this Section *shall terminate in accordance with the terms of the applicable court order*, but not later than the date of the death of the member or the date of the death of the spouse or FS to whom payments are being made, whichever occurs first. *[Emphasis supplied.]*

Thus, in view of the fact that the statute specifically provides that payment of disposable retired pay (DRP) can terminate on an event other than the death of the member or the former spouse, the practitioner

should be as innovative as possible to protect their SM client in this regard. *Most attorneys are unaware of this provision.* It certainly gives the SM's attorney the opportunity to argue to the court that the split of the retired pay should cease upon the remarriage of the FS or some other appropriate event since the intent of retired pay is to ostensibly ensure that elderly SMs and their families are provided for in their old age. The FS, by her remarriage, arguably has obtained another form of "retirement security."

NO DIRECT PAY FOR MARRIAGES THAT DID NOT LAST TEN YEARS

It is always important to remember that if the marriage between the SM and the FS did not last (has not lasted) ten or more years while the SM was on active duty or in an active reserve status (attempting to earn "good years"), the DFAS cannot and will not pay directly to FS the interest in SM's retired pay awarded to her by the court. However, the DFAS can make such payments "indirectly" if the SM takes out an allotment for the amount of FS's interest. In these situations, the SM should be ordered to make an allotment from his retired pay so that the FS will still receive her share of the retired pay *directly* from the DFAS as a result of the SM's court-ordered allotment to her. The Department of Defense form created for the purpose of creating and/or changing military allotments is DD Form 2558. This form can be used for having the SM start an allotment of the FS's share and can (should) be attached to the Decree of Divorce or Domestic Relations Order or other order as an exhibit and the SM ordered to sign and submit it. Remember, you can compel him to sign it, but he retains control of his pay and must be the one to submit it to DFAS. This form can be found at http://www.military.com/Resources/Forms/DD_2558.pdf and downloaded for use. You can find it by entering "DD 2558" in "Google" and find it as well. An exemplar of DD Form 2558, "Authorization to Start, Stop or Change an Allotment," is included at the end of this paper as **Appendix O**. The initiation of such an allotment can also be effected [or changed] by the SM online at *myPay*, on the DFAS website. The *myPay* address is <https://mypay.dfas.mil/mypay.aspx>. It is a secure site and requires the SM to logon with his personal ID and password before he can effect changes, such as the initiation of and/or change to an allotment.

The SM should also be appointed a constructive trustee of any of the FS's retired pay that he receives that is not otherwise paid directly to her by DFAS and

ordered, upon penalty of contempt, to pay any sums not paid by DFAS directly to her (in this case, all of it) with a time certain after his receipt of his monthly retired pay payment, which is usually made by direct deposit into his bank account. Some "form language" to accomplish this can be found in Chapter 19 of the Texas Family Law Practice Manual, which is available from the State Bar Books and Systems Department.

GROSS RETIRED PAY

Gross retired pay is the total amount of retired pay to which the SM is entitled to receive prior to any deductions/reductions for any purpose, such as income tax withholding (federal and state), SBP premiums, pay waived to receive VA disability compensation (which is non-taxable), fines, forfeitures, or for allotments or other deductions a SM is entitled to elect.

DISPOSABLE RETIRED PAY

Since *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), DRP is all that the state divorce courts are allowed to divide. The SM's attorney should **NEVER** allow a divorce decree to state that the FS is entitled to a percentage of the SM's "gross retired pay," more especially if it is an "agreed decree," unless that is exactly what the parties' agreement awards her. If the SM's attorney does let that occur, that is, allows the decree to award the FS a percentage of the SM's "gross retired pay," that attorney is potentially setting himself up to have a professional negligence (legal malpractice) claim made against him by his SM client. This is especially true if the Decree or Domestic Relations Order is contractual. See *Jones v. Jones*, 900 S.W.2d 786, 787 (Tex.App.—San Antonio 1995, writ denied), holding that (1) "a contract is a contract" and even Federal law cannot supersede the "contractual" agreement of the parties; and (2) *res judicata* bars re-litigation of the judgment approving the parties' contract.

Even in view of the *Mansell* ruling that only "disposable" retired pay is divisible, the SM's attorney does not want to run the risk of a judgment awarding "gross" benefits to the FS becoming final and potentially subject to a *res judicata* defense. Even though *Mansell* says that the trial courts of the states of these United States only have the "authority" to divide "disposable" benefits, once the order becomes final, it cannot be attacked collaterally and you are

stuck with the judicially determined division of “gross retired pay.” *Baxter v. Ruddle*, 794 S.W.2d 761 (Tex. 1990); *Segrest v. Segrest*, 649 S.W.2d 610 (Tex.), *cert.denied*, 464 U.S. 894, 104 S.Ct. 242, 78 L.Ed.2d 232 (1983); *Jones v. Jones*, *supra*. See also *Reiss v. Reiss*, 118 S.W. 3d 439 (Tex. 2003); *Shanks v. Treadway*, 110 S.W.3d 444 (Tex. 2003). The SM's attorney, therefore, does not want to bet his malpractice premiums on this, since Congress has been known to reverse rulings of the U.S. Supreme Court in this arena. *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L.Ed. 2d 589 (1981).

In this regard, keep in mind that there are ongoing attempts by SM retiree groups as well as FS groups to make additional changes to the USFSPA in each Congress. Currently, a bill has been passed out of the Senate Armed Services Committee (SASC) that will, if passed, amend the USFSPA in three respects, (1) do away with the 10-year direct pay rule; (2) order DFAS to comply with all court orders that award a fixed dollar amount plus COLAs; and (3) end the requirement that DFAS notify retirees and provide them copy when DFAS receives a court order directing division of retired pay. The success of this Bill is unknown, but it does have the support of both former spouse and military retiree groups. If passed and signed into law, they will be the first changes to the USFSPA since 1990.

Defined by the Congress, “disposable retired pay” is that portion of a SM's retired pay which is left after deducting those items specified in 10 U.S.C. 1408(a)(4). For divorces occurring before February 3, 1991, the definition includes deductions for money owed the U.S. Government (fines, forfeitures and overpayments), income tax withholding, government life insurance premiums, that pay received as disability pay (military disability pay as well as VA disability compensation) and SBP premiums, but only if they are to cover SM's FS receiving a portion of his retired pay (That is, if he remarries and covers his current spouse, those premiums are not deducted to determine the DRP of the FS). For divorces occurring before November 14, 1986, the definition also *completely excludes* pay received by a member who retired under 10 U.S.C. Chapter 61 (received *any* percentage of disability), thus effectively excluding all of that SM's retired pay from direct payment. However, for divorces granted on or after February 3, 1991, taxes and insurance premiums are not included as a deduction to determine a SM's DRP. These distinctions are discussed later in this paper.

ANTICIPATED RETIRED PAY OF MEMBER STILL ON ACTIVE DUTY

Gross Retired Pay and its Calculation

Using the previously discussed benchmarks, the formula for determining the community's hypothetical interest in the SM's gross retired pay would be that sum obtained by multiplying the years married (Months married active duty/12) while the SM was on active duty by 0.025, multiplied by the monthly H3BP of a SM having the pay grade and the same number of years of creditable service as the SM on the date of divorce. In algebraic formula form, the calculation of the dollar amount (value) of the community's hypothetical interest (Final Pay Plan) is as follows:

$$(\text{Months married active duty}/12) \times 0.025 \times \text{H3BP}.$$

If the SM is still on active duty at the time of the divorce, depending upon whom you represent, you will usually want to (1) use a percentage when you represent the FS, while you will usually want to (2) use a fixed dollar amount, if possible, when you represent the SM. If you represent the FS and choose to use a percentage, which you should, then the first step is to determine the percentage of the community's hypothetical percentage interest in the gross retired pay, which is determined as follows:

$$(\text{Months married active duty}/12) \times 0.025.$$

Now apply the percentage awarded to the FS, and you will have the percentage that should be included in the “ORDERED” paragraph of the decree. For post-February 3, 1991 divorces, in most cases, the “gross” will be the same as “disposable” retired pay.

Typically, our judiciary rarely ever divides retirement, whether military or not, other than equally, so the percentage will most likely be 50%. The judiciary usually segregates the retirement as a “special” divorce asset and then divides it equally without any correlation to the court's division of the rest of the marital assets.

Now, multiply “this percentage” times the SM's H3BP at divorce, and you will be able to tell your FS client what, in current dollars, she should expect to receive as the “at least” amount of her share of the retired pay when her husband retires.

Another reason you will want to know the current dollar retired pay amount is for your overall estate asset evaluation purposes where a non-SM client may be considering giving up her interest in this asset in exchange for some other asset, or where your SM client is interested in giving up another asset (other assets) to receive all of his retired pay.

As an example of how to do this calculation, assume your client is an E-6 with 13 years of creditable service and that during those 13 years (156 months), 100 months (8.33 years) of that time was earned during the marriage now being dissolved. To obtain the anticipated gross retired pay that the SM should be entitled to receive on the date of the divorce, first, determine the H3BP of your E-6 with 13 years of service. Thus, assuming a H3BP for such an E-6 in the year of divorce is \$2,865.00, using the foregoing formula, you get the following:

$$13 \times 0.025 \times \$2,865.00.$$

Therefore, if the SM were allowed to retire on the date of the divorce, the SM would hypothetically be entitled to receive the sum of \$931.13 per month as the SM's gross retired pay. However, DFAS rounds down to the next lower dollar amount. 10 U.S.C. §1412. Thus, the retired pay amount is \$931.00. Of course, **this example is not adjusted for** and does not take into consideration **the reduction** in the SM's retirement percentage entitlement **due to his "early retirement,"** as discussed and explained above.

Now that the gross retired pay to which the SM would otherwise be entitled has been calculated, the next step is to calculate that percentage of the gross retired pay in which the community estate has a hypothetical interest. To do this, divide the number of months the parties were married and the SM was on active duty by the total number of months the SM has been on active duty at the time of the divorce. Thus, in our example, the community estate's hypothetical interest in the SM's retired pay is:

$$\begin{aligned} 100 \text{ (or 8.33 years)} / 156 \text{ (13 years)} &= \\ 100/156 &= \\ 0.6410 &= \\ 64.10\% & \end{aligned}$$

The community estate's interest in the dollar value of the hypothetical gross retired pay of the SM would be:

$$64.10\% \times \$931.00 = \$596.77.$$

Thus, the FS' interest, in most cases, would be one-half (50%) of this number, or \$298.38.

However, we have calculated the FS's hypothetical interest in the gross retired pay of the SM. To more accurately determine the dollar value of what she will actually receive, you need to determine the SM's DRP since the trial court is only authorized to divide the community's interest in the DRP. It is actually this amount to which you apply the "50%."

Disposable Retired Pay (DRP): What Is It?

Once you have obtained the estimated gross monthly retired pay of the SM at the time of divorce, or the community's hypothetical interest therein, then, you can attempt to determine what the DRP of the SM is now. It must be pointed out that you can only determine what it "is now" since there are numerous factors that will not and cannot be known until the SM retires that go into determining the deductions/reductions the SM may be entitled to elect that will necessarily reduce the gross figure in arriving at what the DRP actually is upon the SM's retirement.

Definition between September 8, 1982 and November 13, 1986

At the time of the enactment of the USFSPA, DRP was defined by 10 U.S.C. §1408(a)(4) as follows:

"Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which -

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the

withholding of such amounts is authorized or required by law and to the extent such amounts withheld are no greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage);

(F) are deducted because of an election under chapter 73 of this title [10 U.S.C. §1431 et seq.] to provide an annuity to a spouse or FS to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

Definition from November 14, 1986 to February 2, 1991

On November 14, 1986, the definition of DRP was changed to delete the exclusion in its entirety of “(other than the retired pay of a member retired for disability under Chapter 61 of this title)” from the definition of disposable retired or retainer pay. Between November 14, 1986 and February 2, 1991, divorce decrees entered during this time period are governed by the following definition:

Disposable retired or retainer pay” means the total monthly retired or retainer pay to which a member is entitled less amounts which -

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld

are no greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage);

(F) in the case of a member entitled retired pay under chapter 61 of this title [10 U.S.C. §1201 et seq.], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(G) are deducted because of an election under chapter 73 of this title [10 U.S.C. §1431 et seq.] to provide an annuity to a spouse or FS to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

Definition on and after February 3, 1991

In 1990, the DOD Authorization Bill for Fiscal Year 1991 included Section 555 of HR 4739. As a result of this amendment, the definition of DRP was again redefined such that presently the definition no longer includes federal, state and local income taxes or government life insurance premiums. The amendment provides that the effective date of this definitional change was 90 days after the enactment of the legislation, which President H.W. Bush signed on November 5, 1990. Thus, the effective date of the amendment was February 3, 1991. As amended, DRP is now defined by 10 U.S.C. 1408(a)(4) as follows:

The term “disposable retired pay” means the total monthly retired pay to which a member is entitled less amounts which -

(A) are owed by that member to the United States for previous overpayments of retired

pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled retired pay under chapter 61 of this title [10 U.S.C. §1201 et seq.], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title [10 U.S.C. §1431 et seq.] to provide an annuity to a spouse or FS to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

Therefore, reflecting upon the most recent changes to the definition of "disposable retired pay," the SM is no longer allowed to deduct federal and state income taxes or Government life insurance premiums before the FS's share of the SM's retired pay is calculated. Thus, in general, except in cases where the SM was medically retired from his service branch and is receiving medical disability pay, or is receiving retired pay waived in order to receive veteran's disability compensation and SBP premium payments, the FS is entitled to receive her court-awarded percentage of the SM's gross retired pay.

This is not all that the enactment of Section 555 of HR 4739 did in amending the USFSPA, but the other changes, although certainly important, are not directly relevant to this paper.

Classes of Former Spouses

As a result of the 1990 amendment, on and after February 3, 1991, there are now at least eight classes of FSs for the purpose of awarding an interest in a SM's "disposable retired pay:"

1. those FSs who obtained their divorce prior to June 25, 1981 and the decree failed to treat or make a disposition of the military retirement;
2. those FSs who obtained their divorce prior to June 25, 1981 and were awarded a portion of the SM's "gross retired pay;"
3. those FSs who obtained their divorce after June 25, 1981 and prior to November 14, 1986 and whose military member spouse retired pursuant to a provision of 10 U.S.C. Chapter 61;
4. those FSs who obtained their divorce after June 25, 1981 and prior to November 14, 1986 and whose military member spouses received regular non-disability retirement;
5. those FSs who obtained their divorce on or after November 14, 1986 and prior to February 3, 1991 and whose SM spouses received medical disability retirement or VA disability compensation in lieu of all or part of his retirement;
6. those FSs who obtained their divorce on or after November 14, 1986 and prior to February 3, 1991 and whose military member spouses received regular non-disability retirement;
7. those FSs who were/are divorced on or after February 3, 1991 and whose SM spouses receive(d) disability retirement or VA disability in lieu of retirement; and,
8. those FSs who were/are divorced on or after February 3, 1991 and whose SM spouses receive(d) regular non-disability retirement.

Of course, the foregoing assumes an entitlement to direct pay--an overlap of marriage and military service of at least ten years. Otherwise, there are several more classes of FSs.

The significance of these various classes of FSs is (1) the amount of the DRP which is subject to the application of the percentage of the military retired pay awarded to them in the decree of divorce, and (2) whether or not the FS is entitled to direct payment of the amount to which she is entitled.

The first category of FSs mentioned, if they are not now receiving retired pay because of a subsequent partition action, are now barred by federal preemption

from obtaining a portion of the SM's military retirement as a result of the 1990 amendment to the USFSPA. *Havlen v. McDougall*, 22 S.W.3d 343, 344, 24 Employee Benefits Cas. 1529 (Tex. 2000). That is, for partition situations where the military retirement was never divided or treated and the divorce occurred on or before June 25, 1981, the USFSPA provides an absolute bar to any such partition suit. *Id.* This is found in the 1990 amendment at §1408(c)(1). The legislative history of the amendment reflects that the Congress acted in this fashion to counteract the action of state courts in reopening divorce cases finalized before the Supreme Court's decision in *McCarty v. McCarty*, *supra*, that did not divide retired pay. The committee report states that this action—"reopening final divorce cases—is inconsistent with the notion that a final decree of divorce represents a final disposition of the marital estate." H.R.E.P. No. 665, 101 St. Cong., 2d Sess. 279, *reprinted in* 1990 U.S.CodeCong.&Admin.News 2931, 3005.

Havlen v. McDougall, *supra*, *rev'g sub nom.*, *McDougall v. Havlen*, 980 SW2d 767 (Tex.App.—San Antonio 1998), a case which directly addressed this issue, has put to rest, once and for all, the conflict that existed among our courts of appeals. *Havlen* holds that the federal statute controls and bars suits to now divide military retired pay not divided or "treated" in a pre-June 25, 1981 divorce decree.

With respect to the second category of FSs noted above, being those who obtained their divorce prior to June 25, 1981 and were awarded a portion of the SM's "gross retired pay," although these FSs are entitled to payment of a percentage of the "gross retired pay," they can only obtain direct payment from the Government of that same percentage of the SM's DRP as defined in the original enactment of the FSPA.

Additionally, until after the decision in *Mansell v. Mansell*, *supra*, our courts and those of all other states were still awarding a percentage of gross retired pay. Nevertheless, *it is arguable* that, in view of the U.S. Supreme Court's interpretation that only DRP is divisible by state divorce courts, for all awards made after the enactment of the USFSPA, a trial court only has the authority to divide "disposable retired pay" and not "gross retired pay." Thus, to the extent that the decree awards more than DRP, it might be held to be **void**, since although the trial court certainly had the jurisdiction over the parties and the retired pay entitlement, it can be argued that it did not have the authority to award anything other than DRP of the

community property portion. But if it is determined that the trial court had jurisdiction over the parties and subject matter, something that it obviously would have, The Supreme Court of Texas has said that a judgment rendered on an issue, even if erroneous, is not void, but only voidable, and therefore not subject to collateral attack; that is, *res judicata* would bar "re-litigation" of the issue as in an enforcement or contempt action. *Reiss v. Reiss*, *supra*; *Shanks v. Treadway*, *supra*; *Berry v. Berry*, 786 S.W.2d 672, 673 (Tex. 1990); *Segrest v. Segrest*, *supra*. But the response to this argument is that the court only had subject matter jurisdiction over the DRP, the rest being preempted by federal law. That argument will not work for divorces granted prior to the enactment of the statute, or at least prior to the U.S. Supreme Court's decision in *McCarty v. McCarty*, *supra*. The law of this State is very clear on that point and *res judicata* will bar re-litigation of that issue. *See Berry v. Berry*, 786 S.W.2d at 673; *Marriage of Reinauer*, 946 S.W.2d 853 (Tex.App.—Amarillo 1997, *pet. denied.*); *Jones v. Jones*, *supra* at 787.

Those FSs who were divorced from the SM by a decree signed before November 14, 1986 (FS class (3) above), regardless of whether the SM retired before or after November 14, 1986, *are not* entitled to direct payment of any of the interest awarded to them if the SM spouse retired pursuant to a provision of 10 U.S.C. Chapter 61. They can still try to collect through normal judicial process, but are just not entitled to direct pay by the Government even though the marriage lasted ten years or more. (If these FSs were awarded only a percentage of "disposable retired pay," then the FS would be entitled to nothing since there would be no DRP.)

On the other hand, if the SM did not retire for disability under Chapter 61 of Title 10, then the FS is entitled to direct payment, subject to the deductions allowable by the definition. Most notable of these is the deduction for federal, state, or local income taxes. The inclusion of the income taxes as a deduction, allowed/allows the SM to manipulate the amount, to some extent, which is available for payment to the FS.

FSs who were divorced after the effective date of the 1991 amendment will receive more retirement pay as their share than those FSs who were divorced prior to the effective date of the amendment, assuming all other relevant facts are equal.

Thus, if called upon, as is often the case, to obtain a clarification order, the SM's attorney should ensure that the clarification order reflects that any references to the USFSPA in the order refer to the specific version of it that was in effect at the time of the parties' divorce, since that controls which version applies, and the definition of DRP is limited to the then applicable definition. It can mean a great deal of difference to how much the SM will have to pay, whether or not it is all paid by DFAS, as well as how much (or little) the FS receives. Remember, regardless of when the SM retires, the definition of DRP that applies is, in accordance with the statute, controlled by the date of the parties' divorce unless the order specifies otherwise. 10 U.S.C. §1408(a)(2) (defining "court order" to mean "a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement agreement incident to such a decree ...").

Calculation of Disposable Retired Pay in General

The calculation of DRP available for division by the trial court first involves the determination of the SM's gross retired pay. This necessarily involves a "longevity" determination, thereby taking into consideration the fractional equivalent of (months married active duty/12 x 0.025. For a short form "answer" to determining the numbers (or language to put in the divorce decree), you should use the following:

$$\frac{(\text{Months married active duty}/12) / (\text{Months of creditable service}/12)}{x}$$

(Disposable Monthly Retired Pay of <a/an><pay grade> with ___ years ___ months of creditable service).

Mathematically, the "12's" in the numerator and denominator divide out. Thus, the language you might include in a divorce decree if you represent the SM would typically be as follows:

IT IS ORDERED AND DECREED that FORMER SPOUSE have judgment against and recover from SERVICE MEMBER that sum equal to <percentage awarded former spouse> times <months married active duty> / <months of creditable service upon divorce> times the disposable monthly retired pay of <a/an> <pay grade> with <number of years> years <number of months> months of creditable service

toward retirement whose high-36 month base pay on the date of divorce is \$_____, payable if, as and when received by SERVICE MEMBER.

Grier v. Grier, supra; Berry v. Berry, 647 S.W.2d 945 (Tex. 1983); Taggart v. Taggart, supra; Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976); Busby v. Busby, 457 S.W.2d 551 (Tex. 1970).

However, if you represent the FS, you will want to use the following decretal language:

IT IS ORDERED AND DECREED that FORMER SPOUSE have judgment against and recover from SERVICE MEMBER that sum equal to <percentage awarded former spouse> times <months married active duty> / <months of creditable service upon divorce> times the disposable monthly retired pay of <a/an> <pay grade> with <number of years> years <number of months> months of creditable service toward retirement whose high-36 month base pay on the date of divorce is \$_____, together with all active duty COLAs from date of divorce to SM's date of retirement, payable if, as and when received by SERVICE MEMBER.

Grier v. Grier, supra; Berry v. Berry, 647 S.W.2d 945 (Tex. 1983); Taggart v. Taggart, supra; Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976); Busby v. Busby, 457 S.W.2d 551 (Tex. 1970).

If the SM has not retired and is still accruing retirement benefits, it is impossible to determine what his "disposable" retired pay will be; you can only determine his gross retired pay since you will not then know whether he may be entitled to waive a portion of his gross retired pay to receive VA disability compensation or Combat Related Special Compensation (CRSC), which will reduce or wipe-out the DRP, and, thereby, significantly reduce the FS's share of the DRP. So, as a practical matter, if you work the formula down to a monthly retired pay amount payable to the former spouse, you can only determine a percentage of the SM's gross retired pay. This is not all bad, however, since, on the date of divorce, he is not entitled to anything other than gross retired pay. (You may also want to have, as noted above, the H3BP adjusted by the applicable active duty COLAs, while putting in a "floor" for the FS's

share of the retired pay to combat waiver for VA or CRSC.)

When the DFAS receives the order and after the SM retires, they will calculate the retired pay for a SM with the pay grade and longevity for pay purposes of “your” SM as specified in the decretal language of the decree/DRO and then divide that calculated hypothetical gross retired pay at the time of divorce **by** the SM’s actual gross retired pay entitlement upon retirement. This will result in a percentage that the SM’s divorce gross retired pay entitlement “bears” to his total actual retired pay. Here is an example of this, using numbers that come from a real case:

$$\frac{\text{Retired pay for pay grade/longevity at divorce}}{\text{Actual retired pay at retirement}}$$

$$\frac{\$1,249.00}{\$2,981.00} = 41.90\% \text{ of the SM's actual retired pay at retirement.}$$

DFAS will then multiply this percentage by the percentage of the retired pay at divorce that was awarded to the former spouse, which in my example is 50%, so that the former spouse’s interest in actual retired pay being received by SM is 41.90% X 50.0% = 20.95%.

This, of course, is the percentage of the DRP, which DFAS can now also calculate. Former spouse will then receive, if entitled to direct pay, 20.95% of the SM’s DRP each month. *See* 32 CFR Part 63.

If representing the SM, language that can be inserted in the decree that clearly tells DFAS, as well as the parties, that this “adjustment” in the percentage of retired pay is expected and to be effected by the DFAS could be the following:

Upon SERVICE MEMBER's retirement from the United States <Branch of Service>, it is the intent of this Court that the DFAS, pursuant to 32 CFR Part 63, will calculate the amount of retired pay then equal to <Percentage Awarded Spouse>% (of the monthly disposable retired pay of <a/an> <Pay Grade> with ____ years ____ months of creditable service towards retirement) **times** the fraction (percentage) which results from **dividing** the sum equal to the monthly gross retired pay of <a/an> <Pay Grade> with ____ years ____ months of creditable service towards retirement whose high-36 base pay on the date of divorce is

\$_____ **by** the amount of the gross retired pay that SERVICE MEMBER is entitled to receive at retirement, thereby obtaining the percentage awarded FORMER SPOUSE of SERVICE MEMBER's disposable retired pay at retirement, and that DFAS thereafter pay FORMER SPOUSE each month, to the extent allowed by law, the calculated percentage of SERVICE MEMBER's total disposable retired pay, together with all COLA's applicable thereto.

RETIRED PAY OF RETIRED “ACTIVE DUTY” MEMBER

Calculation of Gross Retired Pay

In calculating the percentage of the community's hypothetical interest in the retired pay of a retired “active duty” member, use the same rationale and calculations discussed above, except, in this instance, you will now know the specific dollar amounts with which you are dealing since the SM is already retired and drawing or receiving retired pay. To calculate the percentage of the community estate's hypothetical interest in the gross retired pay, you must still determine the number of months during which the SM was married and on active duty.

Thus, using the previous example of the E-6, but assuming that he retired *prior to the date of divorce* with exactly twenty-two years (264 months), the method of calculating the community's hypothetical percentage interest in the retired pay is as follows:

$$\frac{\text{Months married active duty}}{\text{Months of creditable service}},$$

$$100 / 264,$$

which equals 37.88%. *Grier, supra; Berry (1983), supra; Taggart, supra; Cearley, supra; Busby, supra.*

Now that you have determined the percentage of the community's hypothetical interest in the gross retired pay, apply the percentage awarded to the FS and you will have the percentage that should be included in the “ORDERED” paragraph of the decree. That is, if it is the typical 50% award, the percentage to include in the “ORDERED” paragraph of the decree would be 18.94%. Therefore, the “ordered” paragraph should read something like:

IT IS ORDERED AND DECREED that FORMER SPOUSE have judgment against and recover from SERVICE MEMBER the sum equal to 18.94% of the *gross* retired pay of SERVICE MEMBER, payable if, as and when received by SERVICE MEMBER.

retired pay of SERVICE MEMBER, payable if, as and when received by SERVICE MEMBER.

*The number obtained from solving the formula discussed above.

Since, in this instance, the SM is retired at the time the divorce is granted, there is no necessity to put any limiting language regarding rank or longevity. He is not going to thereafter be promoted or accrue additional longevity unless he is recalled to active duty, which has happened to some SMs since our active involvement in the Global War on Terrorist (GWOT). To provide for the possibility, you may want to include some language that indicates, upon the SM's "re-retirement," the FS's share of retired pay will, of necessity, have to be recalculated.

**ANTICIPATED RETIRED PAY OF "ACTIVE"
RESERVE
COMPONENT MEMBER STILL EARNING
RETIREMENT POINTS**

Calculation of Gross Retired Pay

Calculation of Disposable Retired Pay

The same rationale also applies to the determination of the DRP of a retired SM as discussed above under "Gross Retired Pay," that is, you would use the same community interest percentage calculation. The primary difference between calculating DRP of a *member still on active duty* and calculating DRP of a *retired active duty member* is that you can be reasonably certain that "what you see is what you get." That is, since the SM is already retired, you will usually know whether he is or has the possibility of converting a part or all of his retired pay into VA disability compensation or CRSC. You will also know all of the other deductions that the retired SM has taken, including federal and state income taxes, etc., SBP premiums, etc., as applicable, depending upon when the divorce was granted and which definition of DRP is applicable. Thus, you can be almost certain of exactly what will be deducted from the gross retired pay to obtain the DRP.

To calculate the community estate's interest in a Reserve Component member's expected monthly retirement at age 60, you must first determine the number of total retirement points the member has earned. This information is available to the Reserve Component member from the Reserve Personnel Center for the member's branch of service. Each Reserve Component member should receive an annual report of their earned retirement points, but the date these reports are mailed to the SM varies with each service branch. After you obtain a copy of the Reserve Component member's current retirement point record, you can then determine the total number of retirement points that were earned during the marriage.

When representing a Reserve Component member client, you should prepare a spreadsheet using your client's "Chronological Statement of Retirement Points" or "Annual Retirement Point Record" for use as a trial exhibit to show the court exactly how many points were earned by the SM during the marriage of the parties. You should prepare a similar trial exhibit as an aid to assist the Court in understanding your position whether you are involved in a divorce or in a post-divorce partition suit. An example of such a trial exhibit is included at the end of the paper as **Appendix K**.

Apply the "percentage" to be awarded to the FS to the DRP you have calculated, and you now know the dollar amount the FS should receive. Thus, the "ordered" language for a decree in this instance should read as follows:

The exhibit you prepare should follow the same basic format as the SM's Chronological Statement of Retirement Points prepared by your client's service branch. When preparing your trial exhibit, it is suggested that you show prorated points to coincide with key dates that are relevant to your client's situation before the court. You should also include a separate column entitled "Good Year" so that you can show and argue to the court the "benchmark date" which was applicable to determining the "longevity window" at which point to enter the Monthly Basic

IT IS ORDERED AND DECREED that FORMER SPOUSE shall have judgment against and recover from SERVICE MEMBER the sum equal to <percentage awarded FORMER SPOUSE*>% of the *disposable*

Pay Table. This is particularly important when the Reserve Component member receives a promotion (increases his pay grade) as well as accumulates additional longevity and then, upon retirement, is at a higher pay grade-longevity benchmark than when the divorce was granted.

Assume, for example, the SM is an O-5 with 19 years of longevity who has accumulated a total of 2,127 points as of date of divorce, of which 1,567 points were accumulated during marriage and 560 points were accumulated before marriage. Then, upon divorce, 560 points are the SM's separate property while 1,567 points are community property.

Given this information, the formula for determining the expected monthly retired pay on the date of divorce, payable at age 60 to an actively participating (drilling) Reserve Component member, is:

$$\frac{(\text{Total retirement points earned} / 360) \times 0.025}{\text{x}}$$

(H3BP of an O-5 with 19 years of creditable service).

Thus, using the referenced example and assuming a H3BP of \$4,560.00, this equates to:

$$(2,127 / 360) \times 0.025 \times \$4,560.00,$$

which equals \$673.55.

The community's hypothetical interest in the expected gross monthly retired pay of this active reservist is thus determined as follows:

$$\frac{(\text{Retirement points earned married} / 360) / (\text{Total retirement points earned} / 360)}{\text{x}}$$

(H3BP of an O-5 with 19 years of creditable service).

Again, using the referenced example, this results in the following:

$$(1,567 / 360) / (2,127 / 360) \times \$4,560.00, \text{ equals } 1,567 / 2,127 \times \$673.55, \text{ equals } 0.7367 \times \$673.55,$$

which equals \$496.20.

Calculation of Disposable Retired Pay

The same information which is discussed under the calculation of DRP of an active duty SM is also applicable to the determination of the DRP of an "active" Reserve Component member who is still

earning retirement points. Thus, it will not be discussed again here. However, after having applied the deductions available to the SM and having determined the DRP, you are at a point where the only factor you need to add is the percentage of the community interest that the court has awarded to the FS. Thus, the language to determine the numbers (or to put in the divorce decree) is as follows:

$$\frac{\text{The percentage awarded spouse}}{\text{x}}$$

$$\frac{(\text{Retirement points earned married} / \text{Total retirement points earned on date of divorce})}{\text{x}}$$

Disposable monthly retired pay of <a/an><pay grade> with <total retirement points earned on date of divorce> and a H3BP of \$_____, together with all Active Duty COLAs paid from date of divorce to date of receipt of retired pay.

The decretal language you should include in a divorce decree if representing the SM would typically be as follows:

IT IS ORDERED AND DECREED that FORMER SPOUSE shall have judgment against and recover from SERVICE MEMBER that sum equal to <percentage awarded spouse> times <retirement points earned married> / <total retirement points earned upon divorce> retirement points times the disposable monthly retired pay of <a/an><pay grade> with <total retirement points earned upon divorce> whose high-36 base pay on the date of divorce is \$_____ payable IF, AS and WHEN received by SERVICE MEMBER.

Grier, supra; Berry (1983), supra; Bloomer, supra; In re Poppe, supra.

However, if you represent the FS, you will want to use the following decretal language:

IT IS ORDERED AND DECREED that FORMER SPOUSE shall have judgment against and recover from SERVICE MEMBER that sum equal to <percentage awarded spouse> times <retirement points earned married> / <total retirement points earned upon divorce> retirement points times the disposable monthly retired pay of <a/an><pay grade> with <total retirement points

earned upon divorce> whose high-36 base pay on the date of divorce is \$_____, together with all Active Duty COLAs paid from date of divorce to date of receipt of retired pay, payable IF, AS and WHEN received by SERVICE MEMBER.

Grier, supra; Berry (1983), supra; Bloomer, supra; In re Poppe, supra.

RETIRED PAY OF RETIRED RESERVE COMPONENT MEMBER

Calculation of Gross Retired Pay

If the Reserve Component member has already retired, whether or not the member is currently drawing retired pay, that is, whether or not the member has reached age 60, calculation of the community's interest in the gross anticipated retired pay and/or retired pay actually being received is performed in the same manner in which the calculation of an active duty retired SM is performed except, instead of using "years of service," you use "retirement points earned."

You would think that the only thing that needs to be done is to determine the ratio between the retirement points earned during marriage and the total retirement points earned. Of course, it is necessary to determine each of these figures since they are determinative of the community's interest in the retired pay. In this circumstance, using an example of an O-5 with a total of 1,567 points earned during marriage and assuming the SM client earned another 1,364 points after the divorce prior to retirement, you would obtain the following fraction: 1,567 / 3,491, which indicates that the community's interest in the retired pay, whether gross or disposable, is 44.89%.

If the 1,567 "marital" retirement points were accrued immediately prior to the retired Reserve Component member's retirement, all you would need to do is multiply his retired pay by 44.89% to know what the community's dollar value interest in the retired pay is; then apply the percentage of the retired pay awarded to the FS to obtain the amount of retired pay that has been awarded to her.

However, in view of *Berry (1983), supra*, we must, since the Reserve Component member, at the time he began drawing retired pay, was being paid at the "over 26" level on the Monthly Basic Pay Table, first determine what the gross retired pay of our O-5 with 19

years of creditable service would be since that is the amount of retired pay to which the FS is limited. Unless these "limitations" on pay grade and longevity are applied, the FS will receive moneys that are part of the SM's separate property, being the interest the SM earned as a result of longevity increases (and/or promotions) subsequent to the divorce and prior to receiving retired pay. Therefore, applying *Berry (1983)*, you must use the calculation shown previously to determine the community's hypothetical interest in the retired reservist's gross retired pay and then apply the percentage the court awards to the FS.

Calculation of Disposable Retired Pay

You have now calculated the "gross" retired pay of the retired reservist. To obtain the DRP that is subject to being divided by the court, determine the applicable statutory "deductibles" and subtract them from the "gross." Then apply the percentage of the community's interest in this "disposable retired pay" which the court has awarded to the FS. You will have then calculated the amount of money to which the FS is entitled and should be paid.

Just as was discussed on under "Calculation of Disposable Retired Pay in General," but applying it to the reserve context, if you use a percentage figure rather than a dollar figure, you should use the following formula to determine that percentage:

$$\begin{array}{l} \text{Percentage awarded spouse} \\ \times \\ \text{Retirement points earned married / Total} \\ \text{retirement points earned} \\ \times \\ \text{Disposable retired pay.} \end{array}$$

Thus, the decretal language that you might include in the divorce decree would typically be as follows:

IT IS ORDERED AND DECREED that FORMER SPOUSE shall have judgment against and recover from SERVICE MEMBER that sum equal to ___% of SERVICE MEMBER's disposable retired pay.

IMPACT OF FEDERAL INCOME TAXES

For all pre-February 3, 1991 divorces, the SM will have federal, state and local income taxes withheld from his pay. The DFAS, after doing so, will, if the FS is entitled to direct payment, then divide the SM's

retired pay and make payments to those FSs entitled to receive direct payments.

For all divorces in which an award of retired pay is made to the FS, but where she was not married to the SM for ten or more years, and regardless of whether the divorce was granted before, on, or after February 3, 1991, the DFAS will withhold federal, state and local income taxes from the SM's pay. These withholdings will only be credited to his tax account. The SM himself must figure and apply the applicable "deductibles" to determine the "correct" DRP, and then divide it, and pay his FS her share of the retired pay.

Of course, some pre-February 3, 1991 divorce decrees awarded the FS a portion of the *gross* retired pay of the SM and, if the FS is not entitled to direct payment (or even if she is, but does not receive a full separate property share of the gross retired pay), the instructions in this paragraph are equally important to those FSs.

A frequently posed question is how the FS can recoup that portion of the federal and/or state and/or local income taxes withheld "out of her share." If she is awarded DRP based upon a pre-February 3, 1991 divorce decree, the issue is moot since that is how DRP is defined. If she is entitled to direct payment from the DFAS and the divorce decree was granted on or after February 3, 1991, the issue is again moot since the income taxes are not deducted prior to calculating her interest in the retired pay.

In the event that she is not entitled to direct payment from the DFAS because the marriage did not last ten or more years while the SM was on active duty, it is still a moot point since the SM should pay her the amount calculated according to the applicable version of the USFSPA.

But, if the divorce decree was entered at a time when the court could divide "gross retired pay" (before June 25, 1981, or, probably more correctly, before the *Mansell* opinion (May 30, 1989)), the FS must obtain all of her entitlement directly from the SM in the event she is not entitled to receive direct payment from DFAS or, in the event she is entitled to receive direct payment from DFAS, then, in that event, to the extent her entitlement exceeds that paid directly by DFAS, the FS must obtain that portion of the FS's share of the gross retired pay directly from the SM. In either event, the order should reflect that the SM is to pay "that sum" preferably through an allotment, or, alternatively, through a form of negotiable instrument, i.e., check,

money order, cashier's check, etc., in language that makes the SM's failure to do so enforceable by contempt.

The SM should also be concerned about the taxes. For divorces occurring prior to February 3, 1991 and for divorces occurring on and after February 3, 1991 where the FS is not entitled to direct payment from the DFAS, the federal, state and local income taxes will be withheld from the SM's pay and that income will be reflected on the W-2 which he receives from the DFAS. That is, not only will he have taxes withheld from his gross retired pay (less non-taxable deductions, such as disability pay), but he will also have to declare 100% of his retired pay income on his tax return for the year. Thus, the SM must be advised to send a 1099-R or 1099MISC in January of each year to his FS reflecting the total amount of moneys paid to his FS as her share of the retired pay during the preceding calendar year. He should file the original of the 1099 with the IRS just as any 1099 must be filed. He can then deduct the moneys paid to his FS from his gross income on his Form 1040. The logical place to reflect this deduction is the line for alimony and other support payments. (Since the author is not a tax attorney, it is suggested that the SM obtain appropriate counsel in that regard on any such tax issues, including how to prepare the 1099, where to file it, and on what line of the 1040 he should take the deduction from his gross pay for the payments to his FS.)

In any event, all of the moneys paid to the FS are taxable income to her, just as the gross retired pay is taxable income to the SM in all divorce situations except those occurring on and after February 3, 1991 where the FS is entitled to direct pay from the DFAS. Thus, the payment to the FS, whether made directly by the DFAS, made by the SM or made by a combination of both, is taxable income to her.

As to divorces occurring on or after February 3, 1991 where the DFAS is entitled to make a direct payment to the FS, there is no necessity to prepare and send a Form 1099 to the FS since income taxes are withheld based only upon the amount paid to the SM and/or to the FS. Thus, the SM only has taxes withheld from and is ultimately taxed only on that amount "received" by him since the amount "paid" to his FS is separately taxable to her. The Internal Revenue Service now requires the DFAS Cleveland Center to withhold taxes from the FS's share of the retired pay just as they do from the SM's share. The DFAS will

send the FS an IRS Form 1099-R or equivalent form which will report the amount of the payments made to her and the taxes withheld from her share of the retired pay.

COLA IS DIVISIBLE

The Supreme Court of Texas has not directly ruled on whether or not military retirement cost-of-living increases are divisible upon divorce. *Berry (1983)*, *supra*, comes the closest, but this was a case involving Southwestern Bell retirement and held that post-divorce COLAs, in that instance, were not divisible because they were “bargained for” by the employee spouse and/or those negotiating for the employee spouse. The implication of the court's holding was that if the employee spouse or someone on his behalf, i.e., his union, did not negotiate the increases and they were, as it were, gifts by the employer, then, in that event, the COLAs are and would be divisible. In the military context, since there is no union that bargains for and on behalf of active duty military personnel, it should follow that the COLAs are divisible community property.

Although, as noted, we do not have a supreme court case directly on point, several courts of appeal have addressed the issue, and, although there is a division of authority on this point, at present, the majority of appeals courts favor divisibility. There are several cases holding that post-divorce retired pay COLAs are divisible, which are:

1. *Sutherland v. Cobern*, 843 S.W.2d 127 (Tex.App.—Texarkana 1992, writ dismissed).
2. *Harrell v. Harrell*, 700 S.W.2d 645 (Tex.Civ.App.—Corpus Christi 1985, no writ).
3. *Neese v. Neese*, 669 S.W.2d 338 (Tex.Civ.App.—Eastland 1984, no writ).

There is only one case that holds that post-divorce pre-retirement cost-of-living increases are community property and follow the share awarded to the FS as well as the SM. It is a reserve retirement case where the Reserve Component member had “retired” for all practical purposes at the time of divorce, was no longer in a drill status and was just waiting to live long enough to reach age 60 and begin drawing his reserve retired pay. There, under these facts, the court of appeals said that the FS should share in the post-divorce pre-retirement pay COLAs:

1. *Anderson v. Anderson*, 707 S.W.2d 166 (Tex.App.—Corpus Christi 1986, no writ)

There is only one case that holds that post-divorce retired pay cost-of-living increases are not divisible and are the SM’s separate property:

1. *Dunn v. Dunn*, 703 S.W.2d 317 (Tex.Civ.App.—San Antonio 1986, no writ).

In view of the inference in *Berry (1983)* that COLAs are only the separate property of the employee spouse when the COLAs are the result of a “bargained for consideration” during the course of the employee's employment, and in view of the fact that a majority of the courts of appeals favor divisibility and the almost universal award by trial courts of COLAs to the non-employee spouse as to the interest of that non-employee spouse, the author believes that, if the issue is ever addressed by our supreme court, military COLAs, both post-retirement, as well as those that affect post-divorce base pay, will be found to be divisible community property.

As a practical matter, unless the order specifically states that the FS is not entitled to COLAs, the DFAS will automatically apply applicable COLAs to the FS’s share of the retired pay anyway.

If an order is for a fixed dollar amount and makes no mention of COLAs, the FS is only entitled to be paid the fixed dollar amount. *Moore v. Jones*, 640 S.W.2d 391 (Tex.Civ.App.—San Antonio 1982, no writ).

COLAs AND THE FORMER SPOUSE'S SHARE

COLA calculations are not complicated in the ordinary course of things. However, when you apply Texas law, that is, apply *Berry (1983)*, *supra*, complications begin to arise. In this regard, the problem is that the COLA percentage should be applied taking into consideration the “limitations” posed by the SM's pay grade and longevity at the time of divorce rather than just applying the COLA percentage uniformly to the FS's interest.

If the order awarding the FS her share has language reflecting a pay grade and/or longevity limitation, then, in that event, the DFAS will calculate the retired pay of the SM of the rank and longevity specified in the decree and then will divide that dollar amount by the SM's gross retired pay. This will result in a

percentage or that the calculated retired pay of the SM's pay grade and longevity at the time of the divorce bears to the SM's gross retired pay at retirement. The DFAS will then apply the percentage awarded to the FS and will obtain a "new percentage" that reflects the FS's share of the SM's gross retired pay. Armed with that new percentage, which will always be less than the percentage originally awarded in the decree since it is a percentage of the gross retired pay rather than a percentage of the gross retired pay with the pay grade and longevity limitations stated in the decree, the DFAS will then pay the FS this "new percentage" of the SM's retirement DRP as to all payments mad in the future. Thus, each time a retired pay COLA is authorized, and a new retired pay amount is determined, the DFAS will simply pay the FS the "new percentage" of the SM's new DRP, necessarily thereby paying the FS her share of that COLA as well. 32 CFR Part 63, §63.6(c)(8)(iii).

Solutions to DFAS not honoring Court Orders with hypotheticals that do not calculate the SM's High-3 Base Pay and the COLA issue

A recent phenomenon with court orders sent to DFAS for direct pay registration that involve SMs who are potential H3BP retirees is the rejection of these orders when similar, if not identical orders have been acceptable for processing in the past. The past, but acceptable orders containing hypotheticals for the DFAS to calculate the FS's DRP entitlement and pay it to her involved SMs who were "final pay" retirees. Now, rather than just entering the applicable year's Monthly Basic Pay Table and obtaining the appropriate number, the DFAS must now determine the average 36 months preceding the parties' divorce to have the "base pay" to enter in the time or retirement point formula. This DFAS will not do. As a result, the SM and/or FS and/or their attorneys must determine the applicable H3BP as mentioned above.

This will determine the SM's base pay at the time of the divorce for use by the DFAS in "working the hypothetical formula" in the divorce decree or military retirement order.

An issue arises, however, as to the application of this H3BP amount to the *Berry* (1983) authorization that the FS be entitled to the active duty COLAs that were not "bargained for", but were, as it were, gifts of a grateful government. The SM's "union" did not bargain for the COLAs, so, according to *Berry*, the FS was entitled to share in those annual increases, especially since she has

been awarded a percentage and not a fixed dollar amount.

How does the FS's attorney provide for and/or protect the FS's COLA entitlement until the retired pay kicks in and the DFAS then pays them automatically for qualified FSs? Well, this author can think of two possible ways to provide for the FS to obtain the benefit of the COLAs to the SMs H3BP at the time of the parties' divorce, but both will involve a subsequent modification order at the time of SM's retirement. One way is to provide language that says that the calculated H3BP is to be adjusted (upwards) by all active duty COLAs that become applicable from the date of the divorce to the date of SM's retirement and entitlement to retired pay, at which time the COLAs for retired pay commence. See suggested "decretal" language above.

Another way is to not calculate the H3BP but provide that the applicable H3BP for the formula is to be determined at the date of retirement. The former method seems to be the simplest and allows for the use of actual LESs upon which to base the H3BP determination rather than having to hypotheticate the equivalent thirty-six (36) months of base pay for a SM with the same pay grade and longevity as "your SM." Decretal language that you could use in this circumstance might be as follows:

a. Active Duty SM:

IT IS ORDERED AND DECREED that FORMER SPOUSE have judgment against and recover from SERVICE MEMBER that sum equal to <percentage awarded former spouse> times <months married active duty> / <months of creditable service upon divorce> times the disposable monthly retired pay of <a/an> <pay grade> with <number of years> years <number of months> months of creditable service toward retirement and the high-36 month base pay of <a/an> <pay grade> with <number of years> years <number of months> months of creditable service for pay purposes on the date of SM's retirement, payable if, as and when received by SERVICE MEMBER.

b. Reserve/National Guardsman:

IT IS ORDERED AND DECREED that FORMER SPOUSE shall have judgment

against and recover from SERVICE MEMBER that sum equal to <percentage awarded spouse> times <retirement points earned married> / <total retirement points earned upon divorce> retirement points times the disposable monthly retired pay of <a/an> <pay grade> with <total retirement points earned upon divorce> and the high-36 base pay of <a/an> <pay grade> with <longevity for pay purposes on the date of divorce> and <total retirement points earned upon divorce> of on the date of SM's receipt of retired pay, payable IF, AS and WHEN received by SERVICE MEMBER.

as well as military retiree groups, such as the American Retiree Association (ARA).

FAILURE TO PAY PLANNING AND POSSIBILITIES

Arrearages Dischargeable in Bankruptcy?

In instances where the FS is not entitled to direct payment and she brings a motion to reduce the unpaid payments to judgment (instead of a contempt motion, or because a contempt motion is not appropriate because of the wording of the decree), it is possible that a judgment rendered in her favor against the SM for the retired pay arrearages might be dischargeable in bankruptcy since it is an award of property (and/or a judgment for a money debt) rather than monies paid for the support of the now ex-spouse. The cases hold both ways, although the more recent cases uniformly state that the military retirement arrearages are not dischargeable. Some of the cases holding that pre-petition payments are dischargeable are: *In Re Teichman*, 774 F.2d 1395 (9th Cir. 1985); *In Re Neely*, 59 B.R. 189 (Bankrcy. D.S.D. 1986). In the Fifth Circuit, however, if an adversary proceeding is filed to object to the discharge of such a judgment, it is most probable that the judgment will not be discharged. *In re Dennis*, 25 F.3d 274 (5th Cir. 1994), *cert. denied sub nom., Dennis v. Dennis*, 513 U.S. 1081, 115 S.Ct. 732, 130 L.Ed.2d 636 (1995); *Ersparn v. Badgett*, 647 F.2d 550 (5th Cir. 1981), *cert. denied*, 455 U.S. 945, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982); *Hayton v. Eichelburger*, 100 B.R. 861 (Bankrcy. S.D. Tex. 1989). *See also Wood v. Coffey*, 96 B.R. 993 (9th Cir. 1988); *In Re Thomas*, 47 B.R. 27 (Bankrcy. S.D. Cal. 1984). *Cf. In re Benich*, 811 F.2d 943 (5th Cir. 1987). The position in the cases holding pre-petition payments non-dischargeable is that the SM, even if he is not designated as a "constructive trustee" in the order, is, nevertheless, in a fiduciary capacity and the payments are non-dischargeable pursuant to 11 U.S.C. §523(a)(4) and/or (6).

In any event, the future military retired pay payments (post-petition payments) cannot be discharged since they are not "property of the estate" until each payment is received. Thus, post-filing payments are not susceptible to discharge. *In Re Chandler*, 805 F.2d 555 (5th Cir. 1986); *In re Haynes*, 679 F.2d 718 (7th Cir.), *cert denied sub nom., Miller v. Haynes*, 459 U.S. 970, 103 S.Ct. 299, 74 L.Ed.2d 281 (1982).

DFAS will not pay awards of “fixed” dollar amounts plus COLAs

Although it makes no sense to the author, the DFAS has taken the position that if a fixed dollar amount “plus all applicable cost-of-living increases” is awarded to the FS, the DFAS **will not** pay the FS's share of the COLA, and will only pay the fixed dollar amount. In fact, the DFAS will send the FS a letter indicating that it will only pay her the fixed dollar amount, and, if she believes she is entitled to the COLAs, advise her that she must seek a new order that specifies her award in a percentage of DRP.

On the other hand, if the FS obtains a clarification order that changes her fixed dollar amount to a percentage of DRP, then, in that event, the DFAS will pay the FS's share of the DRP and the applicable COLAs. Since the DFAS, as noted above, converts the FS's “percentage share” of the retired pay wherein there are pay grade and longevity limitations placed upon it, it makes no sense that the DFAS would not do the same thing with a “fixed dollar amount plus COLAs” award. In the latter case, it already has a dollar figure to ratio with the SM's total retired pay at retirement. It seems that, because they are not required to do the additional calculations to convert the FS's delimited percentage, they are going to punish the FSs who were awarded a fixed dollar amount and make them--and the SM as well--incur additional attorney's fees to convert that fixed dollar amount to a percentage to be entitled to direct pay of future COLAs.

As noted above, there is currently a Bill pending in the Congress that will amend the USFSPA and direct the DFAS to pay awards of a fixed dollar amount “plus COLAs.” Its chance of passage is unknown, but it does have the support of FS organizations, such as EXPOSE,

In an interesting twist, consider the attempt of the husband SM in *Bray v. Bray*, 1999 WL 391874 (Tex.App.—San Antonio 1999, pet. denied), an “unpublished opinion,” to “recoup” the amount of a judgment he obtained against his FS for monies he paid in paying a debt for which she was liable but did not pay. She began paying the debt and then filed bankruptcy, obtaining a discharge. SM obtained a lift of stay from the bankruptcy court to allow him to proceed against FS in state court to obtain relief from FS for the remainder of the “discharged judgment” by offsetting the sums owed against future retirement payments he owed her. The trial court approved the scheme, but the court of appeals, upon FS appealing the judgment, said no. The doctrine of recoupment does not apply in the absence of a claim by FS against SM—other than the right to receive her separate property share of the retirement. Thus, recoupment, a defensive tool, cannot be used as an affirmative tool to enforce a judgment absent a claim by the judgment debtor. Additionally, recoupment does not lie because *FS’s right to the retirement benefits is otherwise exempt from attachment, execution and seizure*, citing 29 U.S.C. §1002; Tex.Prop.Code §42.0021. (But this is not “her retirement,” it is his. Sounds like a stretch of the exemption statute to reach, or at least fortify, a result. – Opinion by J. Duncan; dissent by C.J. Hardberger.)

Constructive Trustee Without Saving So

It should further be pointed out that even if the SM's attorney is successful in not including the “constructive trustee” and/or “allotment” language in the order, a motion to enforce and/or clarify can be brought against the SM by the now FS pursuant to Tex.Fam.Code §9.001, et seq. Additionally, as the SM's attorney, you need to advise your client that even if “constructive trustee” and/or “penalty of contempt” language is **not** included in the order, it is probable that a non-paying SM will nevertheless be susceptible to a valid contempt action pursuant to Tex.Fam.Code §9.011(b). That section specifically states that “[t]he subsequent actual receipt by the non-owning party of property awarded to the owner creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner.” *Id.* In addition, in spite of any language to the contrary, Tex.Fam.Code §9.012 states that moneys that are to be paid in installment payments in the future (such as retired pay) may be enforced by contempt. However, without the correct wording in the order, a court cannot enter an order of contempt until a reasonable time for compliance has

expired following the entry of the clarifying order. Tex.Fam.Code §9.008(d).

In a related case on this point, *Perkins v. Perkins*, 690 S.W.2d 706 (Tex.App.—El Paso 1985, writ refused n.r.e.), the parties were divorced prior to the enactment of the 1983 Family Code amendments, which included §3.75, the predecessor of the current §9.011. Post-divorce, the wife brought an enforcement action against her husband for unpaid monthly payments due her by him (after 1983) as part of the property settlement. The Court awarded her a money judgment pursuant to §3.74 of the Texas Family Code (1985). On appeal, the husband argued that the court had no authority to enter a money judgment because §3.74 only applied to divorce decrees signed after September 1, 1983, the effective date of that statute. In overruling the husband's argument the court stated:

As to the argument that Section 3.75 cannot be used to reduce to money judgment payments arising on decrees rendered before the statute became effective, we note that there is no language in the section or within Subchapter D ‘Enforcement’ which indicates that Section 3.70 through 3.77 can only apply to judgments after September 1, 1983. All payments which the court reduced to judgment arose after the date of the statute and we overrule the husband's contention.

Perkins, supra at 708.

Thus, just as former Texas Family Code §§3.70—3.77 were the precursor to the current Texas Family Code Chapter 9, Subchapter A, it is logical extension of *Perkins* that §9.011 creates a fiduciary obligation as a constructive trustee in the non-owning person (SM) who receives property for the benefit of the owner (FS) after September 1, 1983. Tex.Fam.Code §9.011(b).

Statute of Limitations Defense

The SM client should also consider the effect of Tex.Fam.Code §9.003 if he is considering not paying the ex-spouse her share in a timely fashion or if this is a partition suit requesting an arrearage judgment. Section 9.003 provides for a two (2) year statute of limitations on all payments that the SM should have made the FS, and did not make. The two (2) years run from the date that each installment payment was to

have been made. *Havlen v. McDougall*, 22 SW3d 343, 24 Employee Benefits Cas. 1529, (Tex. 2000), *rev'g sub nom.* 980 SW2d 767 (Tex.App.—San Antonio 1998); *Buys v. Buys*, 924 S.W.2d 369, 375 (Tex. 1996); *Ex parte Goad*, 690 S.W.2d 894 (Tex. 1985); *Dechon v. Dechon*, 909 S.W.2d 950, 960 (Tex.App.—El Paso 1995, no writ); *Day v. Day*, 896 SW2d 373 (Tex.App.—Amarillo 1995, no writ) (Statute of limitations begins to run when right accrues, not date of divorce decree.); *Gonzales v. Gonzales*, 728 S.W.2d 446 (Tex.App.—San Antonio 1987, no writ)(Statute of limitations, as to installment payments, begins to run on date installment payment became due.). *Cf. Ward v. Ward*, 806 S.W.2d 276 (Tex.App.—Amarillo 1991, writ denied). However, since §9.011(b) creates a "fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner," as discussed above, it is arguable that, in spite of the two year statute specified in §9.003, the four year fraud or breach of a fiduciary duty statute of limitations applies. Tex.Civ.Prac.&Rem.Code §16.004. This argument would seem to have been foreclosed, however, by *Gonzales v. Gonzales*, *supra* at 448 fn. 1, where it says that the §9.003 limitations period applies to all of the provisions of Subchapter D, *Enforcement*, now Chapter 9. *But see Preston v. Preston*, 2004 WL 1835765 (Tex.App.—San Antonio 2004, no pet.) (Unpublished) (Four year statute of limitations applies to breach of fiduciary duty claims.).

Section 1408 Bar Defense

For partition situations where the military retirement was never divided or treated and the divorce occurred on or before June 25, 1981, the USFSPA provides an absolute bar to any such partition suit. *Id.* This is found in the 1990 amendment at §1408(c)(1). The legislative history of the amendment reflects that the Congress acted in this fashion to counteract the action of state courts in reopening divorce cases finalized before the Supreme Court's decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), that did not divide retired pay. The committee report states that this action--"reopening" final divorce cases--"is inconsistent with the notion that a final decree of divorce represents a final disposition of the marital estate." H.R.E.P. No. 665, 101 St. Cong., 2d Sess. 279, *reprinted in* 1990 U.S.CodeCong.&Admin.News 2931, 3005.

Havlen v. McDougall, *supra*, *rev'g sub nom.*, *McDougall v. Havlen*, 980 SW2d 767 (Tex.App.—San Antonio 1998), a case which directly addressed this

issue, put to rest, once and for all, the conflict that existed among the courts of appeals. *Havlen* holds that the federal statute controls and bars suits to now divide military retired pay not divided or "treated" in a pre-June 25, 1981 divorce decree. In *Havlen*, the SM and FS divorced on April 11, 1977, some four years after the SM had retired. The FS was the petitioner and was the only party represented by counsel. The decree made no mention of the military retirement. More than nineteen (19) years later, the wife sought to partition that retirement. The trial court granted the SM a summary judgment based upon the §1408 federal bar. The court of appeals reversed, finding that, as in *Walton v. Lee*, 888 S.W.2d 604 (Tex.App.—Beaumont 1994, writ denied), *cert. denied sub nom.*, *Lee v. Walton*, 516 U.S. 870, 116 S.Ct. 190, 133 L.Ed.2d 127 (1995), Texas automatically "treats" undivided property. This contention, at least in so far as it relates to military retirement, was specifically overruled by The Supreme Court of Texas' January 13, 2000 opinion, which also brought Texas in line with the rest of the States that have considered this issue. *See Delrie v. Harris*, 962 F.Supp. 931 (W.D.La. 1997); *Kemp v. United States Department of Defense*, 857 F.Supp. 32 (W.D.La. 1994); *Schexnayder v. Holbert*, 714 So.2d 680 (La. 1998); *Terry v. Lee*, 314 S.C. 420, 445 S.E.2d 435 (1994); *Hollyfield v. Hollyfield*, 618 So.2d 1303 (Miss. 1993); *Johnson v. Johnson*, 824 P.2d 1381 (Alaska 1992); *Hennessy v. Duryea*, 955 P.2d 683 (N.M.App. 1998); *In re Marriage of Olsen*, 24 Cal.App.4th 1702, 30 Cal.Rptr.2d 306, 62 U.S.L.W. 2447 (1994); *White v. White*, 623 So.2d 31 (La.App. 1st Cir. 1993); *In re Marriage of Curtis*, 7 Cal.App.4th 1, 9 Cal.Rptr.2d 145 (1992); *Johnson v. Johnson*, 605 So.2d 1157 (La.App. 2d Cir.), *writ denied*, 608 So.2d 152 (La. 1992); *Dunham v. Dunham*, 602 So.2d 1139 (La.App. 1st Cir.), *writ denied*, 605 So.2d 1375 (La. 1992); *Mings v. Mings*, 841 S.W.2d 267 (Mo.App.1992); *Mote v. Corser*, 810 S.W.2d 122 (Mo.App.1991).

In the event that you are interested in an historical perspective of this issue in the Texas appellate courts, consider the following; otherwise, you can skip the next several paragraphs.

In *Havlen*, The Supreme Court of Texas, basically adopted the position espoused in *Buys v. Buys* 898 S.W.2d 903 (Tex.App.—San Antonio 1994, *rev'd on other grounds*, 924 S.W.2d 369 (Tex. 1996); *Knowles v. Knowles*, 811 S.W.2d 709 (Tex.App.—Tyler 1991, no writ); *Walton v. Lee*, *supra* at 606 (Dissent by C.J.

Walker, which cited and agreed with *Knowles.*), each of which upheld the statutory bar.

Redus v. Redus, 852 S.W.2d 94 (Tex.App.—Austin 1993, writ denied), refused to uphold the statutory bar under the facts before it. It found that the California trial court granting the original decree of divorce in 1969 lacked jurisdiction over the wife (a Texas resident who was served in Texas) and therefore lacked jurisdiction to treat the FS's property interest in the retirement benefits. The default divorce decree—the wife did not answer or appear—did not address the SM's military retirement benefits. Thus, the Austin court held, the FS's Texas partition suit was appropriate, and the §1408(c)(1) bar, although applicable if the facts were different, was "distinguished" to be inapplicable.

POST DIVORCE PARTITION SUITS

The 1990 amendment to the USFSPA, with The Supreme Court of Texas' holding in *Havlen v. McDougall*, *supra*, have ended the right of FSs to bring partition suits in Texas to divide retired pay of a SM where that marital asset was not divided or awarded in the decree as to all such decrees entered before June 25, 1981, which did not treat (or reserve jurisdiction to treat) the SM's retired pay.

Paragraph (a) of the amendment (Pub.L. 101-510 §555) established a prohibition against

“retroactive court orders” limiting state court jurisdiction to entertain suits to divide or partition any amount of retired pay of a member as the property of the member or the member's spouse or FS if a final decree of divorce, dissolution, annulment or legal separation (including a court order, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or FS [if such order or decree]

(A) Was issued before June 25, 1981, and

(B) Did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or FS.

10 U.S.C. §1408(c)(1).

Thus, the Congress preempted state courts from entertaining partition suits to divide retired pay that was not divided in decrees of divorce or annulment entered before June 25, 1981. However, for all divorce decrees entered on or after June 25, 1981 that omitted an award of retired pay, state courts can still entertain a partition suit in those cases.

The "effective date language" in subparagraph (e) of the amendment provides that the application of this prohibition against "partition suits" applies "to judgments issued before, on, or after the date of the enactment of this act," which was November 5, 1990. Thus, regardless of when a partition judgment dividing military retirement that was omitted from a decree of divorce entered before June 25, 1981 is or was signed, Congress has declared that order a nullity, subject to the provisions discussed in the next paragraph.

Paragraph (e) further provides that if such a partition judgment was issued before November 5, 1990, then the SM is bound by the judgment to the extent that he was ordered to make payments which were due between November 5, 1990 through November 5, 1992 to the FS of her share of the retired pay as awarded in the partition judgment. Thus, SMs who were defendants in partition suits to divide undivided retired pay which was omitted from a decree of divorce signed before June 25, 1981, should have been able to have stopped making payments to their FSs on and after November 6, 1992 that were ordered by that partition judgment. Pub.L. 101-510 §555(e). *But see Trahan v. Trahan*, 894 S.W.2d 113 (Tex.App.—Austin 1995, writ denied, (1995), cert. denied, 517 U.S. 1155, 116 S.Ct. 1542, 134 LEd2d 646 (1996)). In this State, however, if the partition judgment is a “final” judgment,” *Trahan* says “that dog won’t hunt.”

If, on the other hand, the partition suit and judgment was to divide undivided retired pay as a result of a divorce decree signed on and after June 25, 1981, the SM must continue to pay the FS that part of his retired pay awarded to his FS in that post-June 25, 1981 partition judgment. Pub.L. 101-510 §555(e).

One might think that, since the USFSPA was passed by Congress to correct the federal preemption found by *McCarty v. McCarty*, *supra*, it would therefore be clear to our courts that, just as *Mansell v. Mansell*, *supra*, held that state divorce courts were prohibited from dividing anything other than "disposable retired

pay," our courts would therefore enforce the foregoing language of this amendment. However, Texas appellate courts have held that, as to final judgments in post-divorce partition suits which divided undivided retired pay not addressed in a decree of divorce signed before June 25, 1981, the SM is barred on *res judicata* grounds from using the provisions of the 1990 amendment to the USFSPA (1) in a declaratory judgment suit brought by the SM to stop direct or indirect payments, or (2) as a defense to enforcement proceedings brought by the FS upon the SM stopping payments to the FS. *Trahan, supra*.

In *Sutherland v. Cobern, supra*, this issue was discussed, but it turned on a different point since the divorce court in 1971 had awarded Cobern a share of Sutherland's retainer pay because he was, at that time, in the Fleet Reserve. The suit was brought to construe whether Sutherland, upon completion of his Fleet Reserve time, when his "retainer pay" ended and he began receiving "retired pay," was covered by the 1990 amendment. Sutherland's position was that the trial court did not divide his "retired pay," but only divided his "retainer pay." The Texarkana court held "[w]e need not decide whether *res judicata* might bar this proceeding because we conclude that Sutherland is estopped to assert *res judicata* as a bar in this instance. *Id.* at 131. Thus, this case did not turn on the construction of the 1990 amendment.

INTEREST ON PAST DUE PAYMENTS

All retired pay payments and/or COLA payments due and payable, but not paid by the SM to the FS and/or all COLA reimbursement payments overpaid by the DFAS to the FS accrue interest from the date the payment or reimbursement payment is due as a matter of right. *Anderson v. Anderson, supra*. It distinctly holds that, if pleaded "and the record clearly establishes that an ascertainable amount of [SM's] retirement benefits [is] due and owing," prejudgment interest is "recoverable as a matter of right." *Id.* at 170.

Retirement Must Have Been Divided to be Entitled to Pre-judgment Interest

It is important to note that, in the case of partition suits where there was not a property settlement agreement (no contract), there must have been an award of an interest in the retirement benefits before the unpaid payments will accrue interest. In the court of appeals opinion in *Buys* (898 S.W.2d at 911), the FS requested pre-judgment interest asserting "she was entitled to an

ascertainable sum of money determined to have been due and payable at a date certain prior to judgment," citing *Anderson. Buys*, 898 S.W.2d at 911. The San Antonio court held, however, that she was not entitled to an ascertainable sum that was due and payable at a date certain prior to judgment. In this "partition" suit, the divorce decree nor the property settlement agreement "divided" the military retirement or the civil service retirement. The benefits were ostensibly held jointly by the parties until partition, and, as such, the amounts were not due and payable until the entry of the judgment in the trial court. *Id.* The supreme court, however, also reversed the court of appeals on this pre-judgment interest entitlement point, stating that, since there was a property settlement agreement, Ms. Buys was entitled to pre-judgment interest on each installment when due based upon the contract between the parties. *Buys*, 924 S.W.2d at 375. Thus, it would appear that if the suit is a *pure partition suit* to divide untreated, undivided retirement, the court of appeals decision would dictate pre-judgment interest should **not be awarded, as a matter of law**. 898 S.W.2d at 911. On the other hand, the *Buys* supreme court decision would dictate that in partition suits that involve suits to enforce a prior judgment incorporating a property settlement agreement where there the asset has been treated by a residuary clause or in suits to enforce and/or clarify a prior judgment awarding the FS an ascertainable sum due and payable at a date certain in the past, pre-judgment interest can be awarded (if pleaded). 924 S.W.2d at 375.

What Interest Rate Applies?

Assuming you are entitled to interest under *Anderson*, the next question is what is the applicable interest rate. Since the sum is ascertainable, the interest rate is probably six percent (6%) per annum as provided in Tex.Fin.Code §302.002. See *Dechon, supra* at 962. On the other hand, the judgment rate of between five percent (5%) and fifteen percent (15%) per annum compounded annually, Tex.Fin.Code §304.003, may be more apropos. The post-judgment rate fluctuates monthly, but can be determined by accessing the website of the Office of the Consumer Credit Commissioner at http://www.occc.state.tx.us/pages/int_rates/Index.html. Currently, this site says that the judgment rate for the month of July 2007, at the time this article is in process, is eight.two-five percent (8.25%) per annum.

Case law on this point is sparse, at best. Arguably, if the suit is to enforce a previously entered judgment which established a right to retired pay and reduced to judgment the arrearages due and owing, you could justify the applicability of the then current judgment rate since you are enforcing the original judgment and, therefore, you should be entitled to the post-judgment rate of Tex.Fin.Code §304.003.

Arguably, if the judgment fails to specify a post-judgment interest rate and/or an entitlement to post-judgment interest, there is not an entitlement to interest on the judgment. Tex.Fin.Code §304.001.

When pleading an entitlement to pre- and post-judgment interest, to be on the safe side, you should NEVER plead a specific interest rate; instead, plead an entitlement to "the maximum rate allowed by law." Thus, at the time that the judgment is entered and the pre-judgment interest calculated, the determination of the applicable judgment rate is a judicial act. Therefore, your client should be insulated from any potential claim of usury in case you thought the applicable interest rate was in excess of the then posted legal rate.

SURVIVOR BENEFIT PLAN (SBP) FOR ACTIVE DUTY RETIREES

The Survivor Benefit Plan (SBP), 10 U.S.C. §1447 et seq. (Chapter 73, Subchapter II), is an annuity for military members to provide for their survivors. They can choose one of several categories of beneficiaries which are: spouse only, former spouse only, child(ren) only, spouse and child(ren), former spouse and child(ren), and persons having an insurable interest in the retiree. The premium for each category of beneficiary is different and established by law. 10 U.S.C. §1450(a).

Courts Could Not Order Prior to November 14, 1986

Prior to November 14, 1986, courts were not permitted to order a SM to designate his then current spouse as a former spouse beneficiary under the SBP. The SM could voluntarily designate his soon to be ex-spouse as a former spouse beneficiary voluntarily, but the court's authority to order him to do so was preempted by Federal law prior to that time. 10 U.S.C. §1450(f)(2). (Pub.L. 99-661, §641(b)(2)(A)).

Even though courts were not permitted to do so, because some form books, including the Texas Family Practice Manual at that time, had suggested language which ordered the SM to name the former spouse as a beneficiary under the SBP or to continue to name the FS as a beneficiary under the SBP, specifically ordering the SM to continue and maintain in full force and effect the designation and further ordering the SM not to "modify, amend, withdraw, or in any other manner alter the election to name [Name of Former Spouse] beneficiary of the Armed Services Survivor Benefit Plan," there are some decrees still "floating around" the legal system which purport to order SMs divorced prior to November 14, 1986 to name the FS as a beneficiary under the SBP. The commentary to the suggested language in the form book did not indicate that the courts had no authority to order an SBP designation until on and after November 14, 1986. Ironically, the sum and substance of the language then suggested in the Texas Family Law Practice Manual was to order the SM to do nothing. If the FS was named as a "spouse beneficiary," then the SM was ordered not to change that designation, thus effectively defeating the FS's claim since she, following the divorce, had to be redesignated as a "former spouse beneficiary." If the SM was still on active duty at the time of the divorce, the court's order was a nullity since, even if the court had the authority to enter the order, the language ordered the SM merely to designate the FS as a "beneficiary" without any "ordered" language compelling him, when he was entitled to make such an election at the time of his retirement, to designate her as a "former spouse beneficiary". An active duty SM does not have the right to make a designation of a SBP beneficiary until immediately prior to his retirement. 10 U.S.C. §1448(a)(2)(A).

After the November 14, 1986 amendment to 10 U.S.C. §1450(f)(2), state divorce courts were authorized to order the SM to retain the spouse as a beneficiary by redesignating her as a "former spouse beneficiary" and were also authorized to order the SM to designate the FS as a beneficiary. *See Morris v. Morris*, 894 S.W.2d 859, 864-65 (Tex.App.—Ft. Worth 1995, no writ) (upholding the trial court's order prohibiting SM from changing his SBP beneficiary.).

If a retirement eligible member is on active duty, the spouse is automatically covered unless she declines the coverage. That is, upon retirement, the SM has no choice but to designate full coverage unless the FS cooperates and "signs off," agreeing to less than full

coverage or no coverage at all. If the FS does not agree to less than full coverage, then, in that event, the DFAS implies an election of full SBP coverage for the FS.

If the SM is retirement eligible, but still on active duty, no designation will be made if a divorce is effected prior to the SM's actual retirement. In this event, the court must order SBP FS coverage for the FS if the FS desires the coverage. If there is no court order to that effect, and unless the SM agrees to designate the FS for "former spouse" coverage, the FS will not be entitled to SBP coverage.

Former Spouse Designation Must be Made Within One Year of Date Decree Signed

Even after a court had the authority to order the SM to make such an election and some sort of appropriate language was put in the decree ordering the SM to elect to designate his soon to be FS as "a beneficiary," **the designation must be made within a one year period from the date of the divorce or it is forever barred.** 10 U.S.C. §1448(b)(3)(A)(iii).

The FS, should make this designation, whether or not made by the SM, since she is the only one—or the primary one—to benefit from such a *former spouse beneficiary* designation. The FS's attorney **must assume** the responsibility for ensuring that the "deemed election" is made with DFAS within the one-year limitation period. **Otherwise, the FS's attorney has committed legal malpractice!**

The practitioner should also remember that the award of SBP is not automatic even though the FS may be being awarded a part of the SM's retired pay elsewhere in the decree. The designation of the SM spouse as a *former spouse beneficiary* must be expressly ordered in the decree or, upon divorce, the retired SM can request the DFAS to delete SBP coverage if it was previously in existence prior to the divorce.

Filing SBP Coverage Deemed Election

Ordinarily, an active duty SM cannot elect SBP coverage until he is eligible to and does retire. Then, he has a one-year period in which to designate one of the coverage options under SBP. Furthermore, the SM must either agree to designate a FS as a former spouse beneficiary or be ordered by the court to do so. Therefore, if you represent the FS and have had the SM ordered to designate her as a *former spouse beneficiary*, then, even though the SM is ordered to do it, **YOU, the**

FS's attorney, should file or "register" the divorce decree with the DFAS and inform them that you are filing the divorce decree to activate a "deemed election" at the time of the SM's retirement! The address to which this deed election letter must be sent is: Defense Finance and Accounting Service—London, Attention: Code: FRABA, P.O. Box 99191, Cleveland, OH 44199-1126.

You must effect this "deemed election" within one year of the date the divorce decree is signed, or the now former spouse has waived her entitlement to the designation as a former spouse beneficiary.

At that point, the only recourse will be to ensure that the SM carries out his responsibilities under the divorce decree at the time of his retirement by designating the FS as a former spouse beneficiary at that time. By filing the divorce decree or military retirement order with the DFAS to effect the deemed election, this will prevent the SM from failing to carry out his responsibilities under the decree at the time of retirement by designating the FS as a *former spouse beneficiary* and defuse, at the outset, a malpractice time bomb that will otherwise be waiting for the right time—the SM's death—to explode and come back to haunt you—possibly in your retirement!

The SM can, if he is still on active duty at the time of the divorce, upon retirement, do nothing or elect to discontinue spouse beneficiary coverage, and, after one year from the date of his retirement, he, as well as the FS, will be foreclosed from designating her as a former spouse beneficiary.

The same applies if the SM has already retired and upon retirement designated his then spouse as a spouse beneficiary, but is not ordered to designate his now FS as a *former spouse beneficiary*, or if she fails to initiate a "deemed election" by filing the divorce decree which orders him to so designate her with the DFAS, and the one year period expires. She is then foreclosed from electing such coverage after the one-year period has expired unless, perhaps, she can force a deemed election or a "court ordered" election during a subsequent Congressionally mandated "open season."

You should also remember that just because you submit the decree to the DFAS to initiate the payment of retired pay (or file or register the decree for that purpose), it is insufficient to effect a deemed election of the FS as an SBP beneficiary. This is true even if the decree provides that the FS is to be designated/redesignated as a *former spouse* beneficiary. You must specifically request the *deemed election* in addition to requesting direct payment of retired pay, if applicable. It cannot be done in the same correspondence! It must be done in two separate requests to the DFAS, one for the retired pay (Cleveland, OH), and one for the deemed election of the FS as a *former spouse SBP beneficiary* (London, KY).

REMEMBER, you only have a one-year window from the date the decree is signed to get your FS client deemed as a FS SBP beneficiary! Make this task part of your responsibilities on closing the file just like transferring the title to the car or house. Failure to complete this task, however, may have a far greater monetary penalty than the failure to transfer a car title.

Election Usually Irrevocable; Open Season

You and your SM client should also be aware that, once made, the election to cover a FS as a beneficiary is irrevocable for the duration of the FS's life. 10 U.S.C. §1448(a)(4). Occasionally, however, the Congress will provide for an “open season” during which “season” SMs can modify, alter, terminate and/or initiate SBP coverage, subject to whatever limitations that the Congress establishes for such an “open season.” Thus, consideration should be given to putting language in the decree that allows each party to modify the coverage afforded, subject to the concurrence of the other party, if the planned change affects the other party. Thus far, these “open seasons,” including the last one that expired on September 30, 2006, have not allowed a SM to terminate his SBP coverage. “Open season” options are addressed later in this article.

Nothing, however, should prohibit a FS, after being designated or deemed as a former spouse beneficiary, from filing a written election to terminate her designation should she feel the need or financial necessity to do so. These are sometimes honored by DFAS. The author has had DFAS in one instance approve one cancellation by a FS, but DFAS required a court order allowing her to do so, and in another, even though cancellation of the FS SBP was authorized in a

clarification order, declined to allow the FS to cancel or terminate the coverage.

Election previously refused by then spouse

If the SM is married at the time of his retirement (or at the time he must make an election if a reservist—at the time he has completed 20 good years for retirement purposes) and his then spouse (our FS) participates in the decision to decline SBP coverage for her, even if the Court were to order the SM to participate in electing to designate the FS as a “former spouse beneficiary” of his SBP, DFAS will not recognize the court’s order or the attempted designation. However, if after declining coverage during marriage and an open season for making and/or upgrading SBP designations occurs during which the SM and spouse then elect to participate in the SBP program, such that, upon divorce, FS is then a “spouse beneficiary,” she can, in this event, be designated and/or the Court can order that she be deemed a “former spouse beneficiary” of SM’s SBP.

Effect of Remarriage before Age 55

In the event that the FS is considerably under the age of 55, even if the SM is near retirement, you should give thought to not having the FS designated as a *former spouse beneficiary*. This is because if the FS remarries before she reaches age 55 or if she remarries another SM who designates her as his former spouse beneficiary, whether before or after 55, the designation will, upon either eventuality, make “this” designation a nullity because the statute specifically bars the FS from collecting in either instance. 10 U.S.C. §1450(b)(2). Of course, in the latter instance, the government is not going to let her collect two SBP payments in any event. Further, the ultimate result, if this occurs, is that the designation, upon the active duty member’s retirement and/or the Reserve Component member’s becoming retirement eligible (20 good years), will cost both the SM and the soon to be FS their respective shares of the cost of the premium for the months it is in effect.

Only One SBP Beneficiary Category Can Be Designated

A SM is entitled to designate only one category or class of beneficiaries. Thus, if he has already designated or the court has “deemed” an election of a former spouse beneficiary and that election is properly filed or registered with the DFAS, the SM

cannot designate any other class, such as his new spouse, as a SBP beneficiary of his military retirement. 10 U.S.C. §1448(b)(2)(B). *Schneider v. Schneider*, *supra* at 929-930.

Even if the SM wants to award one FS a fractional interest, i.e., 50% of the annuity benefit, so he can later designate a new wife as the beneficiary of the other half, he cannot do so. Even if the SM and FS agree that his FS will only receive, for instance, the same fractional interest in the SBP annuity that she is being awarded in the retired pay, it is a nullity. *Id.* at 929.

Neither can the court make such an award. There can only be one SBP beneficiary. 10 U.S.C. §1448(b)(2)(B). *Schneider v. Schneider*, *supra* at 929-930.

The DFAS is going to pay the full SBP annuity payment on the death of the SM to one designated beneficiary. The DFAS is also going to take the first filed or registered beneficiary as the one it will honor, absent a court order that adjudicates the conflicting designations. This suit may have to be filed in Federal court since it may be between citizens of two separate states.

Service Member and Former Spouse Share Monthly Premium Cost

Another consideration the SM's attorney should apprise his client, but more especially the court, of is the fact that the monthly premium for the SBP coverage "comes off the top" before the application of the percentage that goes to the SM's FS. Thus, unless there is an adjustment in the percentage awarded the FS to account for the premium's cost, the SM will be paying a portion of the cost of the SBP coverage, the amount varying with the percentage awarded of retired pay awarded the FS. For instance, as was the case in *Schneider*, the FS was only awarded 31.9% of the SM's retired pay. The FS wanted to be covered as an SBP former spouse beneficiary and agreed to pay 100% of the cost of the monthly premium. In this case, she began reimbursing the SM the full amount of the monthly premium until she realized that she was actually paying 131.9% of the premium cost. She then reduced her monthly payment to the SM to 68.1% of the premium cost because she was already paying 31.9% of the premium cost, that amount being deducted off the gross retired pay before she was paid her 31.9% of the DRP. *Schneider v. Schneider*, *supra*.

To compensate for the SM always automatically paying the biggest percentage of the cost of the SBP annuity for the FS, the percentage of retired pay awarded to her should be reduced to account for the percentage of the premium cost that he necessarily will pay each month. This is a relative easy mathematical computation to make, but you should have such a calculation prepared to demonstrate to opposing counsel and the court the adjustment that needs to be made. *Id.*

The practitioner should also be cognizant of the SBP discussion and holding in *Limbaugh v. Limbaugh*, 71 S.W.3d 1 (Tex.App.—Waco 2002, no pet.). Here, in a direct appeal of the divorce decree, the court specifically found that, although the SM asserted that his payment of any part of the SBP premium that only benefited his FS, "because such order improperly requires "a permanent, and for a period of time double, monthly maintenance payment." *Id.* at 15. The marriage was very long and the FS was a minimum wage employee. This author believes that the court stretched the law a great deal in arriving at its holding that the trial court, over SM's objection, correctly required the SM husband to pay a share of the SBP premium. The court said:

However, a divorce court may order a spouse to make post-decree payments for the benefit of his former spouse for life if such payments "are directly referable to the rights and equities of the parties in community property at the time of divorce." *Siefkas v. Siefkas*, 902 S.W.2d 72, 75 (Tex.App.—El Paso 1995, no writ); *accord McBean v. McBean*, 371 S.W.2d 930, 932 (Tex.Civ.App.—Waco 1963, no writ) (required monthly post- divorce insurance premium payments do not constitute improper "permanent alimony"); *Bunker v. Bunker*, 338 S.W.2d 770, 770 (Tex.Civ.App.—San Antonio 1960, no writ) (required monthly post-divorce payment of \$300 for life in settlement of spouse's "substantial community property rights" not "permanent alimony"). Because the monthly payment for the survivor benefit annuity is "directly referable" to this community asset, we conclude that the court did not abuse its discretion by ordering Leland to continue making this payment. *See id.* Accordingly, Leland's fourth issue is without merit.

Limbaugh at 15-16.

This is basically a trial court and a court of appeals bending the available law to reach the result they wanted. The SBP premiums are only “indirectly referable,” and only to the extent that the premium payments are a percentage of the SM’s gross retired pay. The SBP is not and was not “a community asset.” At best, it is the equivalent of a term life insurance policy that has no cash value, or is analogous to a health insurance policy. Neither survives a divorce unless the spouse wanting the coverage pays for it! Unfortunately, the Court was presented with “a poor and pitiful wife” fact situation, refused to follow our maintenance statute’s provisions, chose “old bad law” to reach their desired result to provide for and protect this “poor and pitiful wife.” A case of “bad facts making bad law.” So, if you are looking for a case to convince the court to have the SM pay one-half of the SBP premium—although the SM will almost always pay more than one-half of it—*Limbaugh* is it. *Cf. Schneider v. Schneider, supra.*

The Court is Awarding the Former Spouse Alimony!

If you represent the SM and believe that the court may or is going to “order” the designation of the FS as a SBP “former spouse beneficiary,” you need to be prepared to make the court aware that, unless some provision is made for the FS to pay that portion of the premium costs that is automatically being paid by the SM, the court will be, in this instance, ordering the SM to pay court-ordered alimony for and on behalf of the FS. Further, since the election, once made and registered, is irrevocable, this court-ordered “alimony award” is a lifetime award. The author does not see how such a court-ordered deemed election of a former spouse beneficiary can be construed otherwise. *Francis v. Francis*, 412 S.W.2d 29, 31-32 (Tex. 1967).

However, one might argue that since we now have a maintenance statute, these payments, if the FS qualifies under Tex.Fam.Code §3.9601 et seq., could be theoretically ordered for a period not to exceed three years. The “Catch-22” is that the court’s award will extend for a period far greater than the three years authorized by the maintenance statute and, if this is all that the court is intending, the SM’s attorney should ensure that, after the three year period, the FS is ordered, under penalty of contempt, to pay/repay/reimburse the SM for the share of the monthly premiums that are being directly deducted

from his portion of the retired pay by DFAS. *Schneider v. Schneider, supra.*

Irrespective of the foregoing, *Limbaugh, supra* at 15-16, discussed above, holds that a trial court can “award permanent maintenance/alimony” and order the SM to pay a fifty percent (50%) or more share of the SBP premium cost to cover the FS as a former spouse beneficiary of his SBP. That said, ***in most situations, the FS is receiving less than 50% of SM’s retired pay; thus the SM is and will be paying well in excess of 50% of the monthly SBP premium cost.*** *Cf. Schneider v. Schneider, supra.* How about that for a “fair alimony maintenance award,” even if it is “directly referable to the rights and equities of the parties in community property at the time of divorce.” *Limbaugh, supra* at 15-16. Doesn’t sound “just and right” to me.

Premium Payments By Former Spouse

Since the election is irrevocable once made, as noted above, there is no point in putting language in the order which forfeits the election if the FS fails to pay all of the premium costs each month incurred by the SM as a result of his having designated, or having been ordered by the court to designate, the FS as a beneficiary under the SBP. The only sure way you can protect the SM in this situation is to ***reduce the share (percentage or dollar amount) being paid*** to the FS as her share of the retired pay to compensate or cover the cost of the SBP premium she should be paying. **Remember, the FS is the only one who will benefit from her designation as the SBP former spouse beneficiary so she should pay for that benefit.** *Cf. Schneider v. Schneider*, 5 S.W.3d 925 (Tex.App.—Austin 1999, no pet.).

Otherwise, to recoup (collect) the share of the monthly SBP premium which is being withheld from his share of the retired pay, assuming that the FS does not voluntarily repay the SM on some agreed upon schedule (monthly, quarterly, semi-annually or annually), he will, more than likely, have to plan to file a lawsuit within the applicable statute of limitations to reduce to judgment that portion of the premiums which have been deducted from his share of the retired pay. The FS, other than defending such a collection suit, has very little to lose in such a situation since, once the election to cover her as a *former spouse beneficiary* has been made, the election is irrevocable, and, frequently, she is “judgment proof.”

Of course, in such an event, you, as the SM's attorney, may be "buying" a lawsuit as well! Certainly, you will want to counsel the SM in this regard, and, have something in your file reflecting that you have done so.

Irrespective of the above comments, since some attorneys try to provide for a requirement for the FS to reimburse the SM for the SBP premiums and since some courts order the SM to maintain the FS as a *former spouse beneficiary* but order the FS to pay to the SM the cost of the premiums for the coverage, you may want to include some "contempt language" to hopefully assist the SM in collecting such unreimbursed premium payments. If this is the case, make sure you designate the FS as a fiduciary, that is, a constructive trustee, of these unreimbursed premium payments. Otherwise, the payments are merely in the nature of a debt, and contempt may not lie. See Tex.Fam.Code §9.011(b). If the FS is designated as a fiduciary and fails to pay the unreimbursed premium payment, then, in that event, the FS should be in the same situation that many of the retirees who filed writs of habeas corpus were (and are) in when they refused (refuse) to pay their former spouses their share of the retired pay. Additionally, if the FS is not designated as a fiduciary, the payments may be dischargeable in bankruptcy.

Thus, **the caveat** is that this issue should be fully discussed with the SM client, and the SM client should make all of the decisions in this regard, unless the requirement to designate the FS as a *former spouse beneficiary* is court-ordered. You must, if you are the SM's attorney, make the court aware of the ramifications of any order to designate the current spouse as a *former spouse beneficiary* of the SBP since most of our judiciary knows much less than you do about the SBP and the ramifications of ordering the "former spouse" to pay the monthly cost of her designation as a *former spouse beneficiary*.

SBP Costs to Cover New Wife/Child Are Divisible Community Property

On the other side of the *Schneider* coin, consider the scenario where, after the divorce, the SM remarries and designates the new wife and/or new family's child as an SBP beneficiary. In so doing, the SM has reduced not only his retired pay, but the FS's retired pay as well to pay for the annuity that provides for the new family's security upon his death. Since the premiums, as noted, "come off the top," that is, they are deducted

from the gross retired pay before the division of retired pay is made and FS is paid her percentage share, her share is necessarily adversely affected solely to benefit SM's new family. Thus, instead of the SM paying for a percentage of the FS's annuity benefit as is often the usual case, the FS is paying a percentage of an annuity that only benefits SM's new wife.

Is this allowable or should the SM have to pay the FS the percentage share that she is paying to cover the new wife and/or child? There are no cases in Texas, but the Third Circuit Court of Appeal of Louisiana has held that the SBP cost in this instance is community property that is divisible, irrespective of the USFSPA's definition of DRP. *Fricks v. Fricks*, 771 So.2d 790 (La.App. 3rd Cir. 2000). Thus, the SM must pay FS the amount being deducted from her share to provide the SBP benefit to SM's new family. It makes good sense to me! Cf. *Schneider v. Schneider, supra*.

The DFAS has reportedly corrected this situation by no longer deducting the SBP premiums from the gross retired pay if the covered person is not the FS who is receiving a share of the retired pay and would otherwise also be paying a portion of the cost of the SBP premiums covering the new wife.

Life Insurance, Alternative to SBP Coverage

If the SM is otherwise readily insurable, an annuity and/or life insurance policy can be purchased to provide the “former spouse” with a retirement income death benefit substitute. Although SBP is, overall, a good annuity for the cost, its value to the parties will depend upon their respective life expectancies, the health of the parties, as well as the parties’ respective ages at the time the decree is signed. Since the monthly premium for full coverage is 6.5% of the gross monthly retired pay, assuming a waiver for VA disability compensation does not apply, if the parties are in good health and expected to remain so and are relatively young, they could be paying a very great deal for a coverage that may not pay until they have paid sizeable premiums for a great many years. Although Congress has now limited the premium payments to thirty years, at \$100.00 or more a month for those same 30 years, that is at least \$36,000.00 *without factoring in the effect of applicable COLAs on the cost.*

Of course, just as the SM is receiving COLAs on his retired pay each year, so will the cost of the SBP premium go up as well, keeping pace with his increased retired pay.

If the SM does not die until after he attains the age of 62, the annuity amount drops from 55% of the retired pay the SM was receiving to 35%. (This reduction is an offset to the annuitant’s entitlement to receive Social Security at that age. In 2004, the Congress has, however, after extensive lobbying efforts by “The Military Coalition” of military organizations, stopped this discriminatory offset effective in 2008, although efforts are still in process to make the change effective immediately.) On the good side, however, just as the retired pay has been increasing each year by the amount of the COLA, as noted above, so will the annuity amount (whether the current percentage of 50% as of April 1, 2007, or 55% on April 1, 2008 and future years) continue to increase by the amount of the annual COLA each December.

If the FS chooses to purchase a life insurance policy on the SM (her insurable interest being the loss of her portion of the retired pay upon the death of SM) rather than pay the cost of the SBP coverage, then, in that event, the SM should be ordered in the decree to cooperate in completing such life insurance applications and/or participating in any medical examination and/or physical required to obtain the coverage.

Further, before the entry of the divorce decree, the FS's attorney should ensure that the SM is not only insurable, but is also “economically insurable.” Consider, for example, an actual case where the FS elected to purchase a life insurance policy on the SM in lieu of SBP coverage with the SM being ordered to participate in completing the life insurance application and medical examination/physical required for the coverage. Much to the chagrin of the FS, however, the medical examination showed the SM to have high blood pressure (which was not previously diagnosed and may have been situational—he did not want the divorce and took it hard) and this resulted in his being “rated” as a potential coverage risk. As a result, he no longer qualified for the “best and lowest premiums,” such that the premium cost to insure the SM made it economically impossible for the FS to purchase the life insurance on the SM post-divorce. At that point, although she tried to revive the SBP option, she could not do post-divorce with a “motion to clarify” what she had voluntarily given up upon divorce—barred by *res judicata*.

**RESERVE COMPONENT
SURVIVOR BENEFIT PLAN (RC-SBP)**

This plan, also found at 10 U.S.C. §1447 et seq., is substantially similar to the active duty plan except that the Reserve Component member is required to make an election of coverage at the time when he has been notified of becoming retirement eligible, that is, having served 20 qualifying years (“good years”) toward retirement. If the Reserve Component member is married at the time that he is retirement eligible, he must make an election in which his spouse must participate. 10 U.S.C. §1447(a)(3)(B). Unless both parties agree to the choice being made, the DFAS will deem an election that the Reserve Component member has elected “full coverage” for his spouse.

The Reserve Component member usually obtains retirement eligibility prior to reaching age 60. Upon the election for one of the spouse coverages and upon the death of the SM before age 60, depending upon the election made, the FS will be entitled to reduced benefits either immediately, if that election was made, or when the SM would have reached age 60. 10 U.S.C. §1448(e). “Full coverage,” however, means, in this context, an entitlement to the annuity immediately upon the SM’s death, regardless of whether he is 60 years old or not. Thus, if he lives to

age 60 and begins receiving retired pay, it will be much less than if “full coverage” had not been elected.

If the Reserve Component member marries after becoming retirement eligible, he can elect to cover his new spouse provided he makes the election within one year of the date of the marriage. On the other hand, the Reserve Component member can also change his election if his spouse or former spouse beneficiary dies. The Reserve Component member also has the option to elect coverage for his spouse at the time he begins receiving retired pay at age 60. 10 U.S.C. §1448(a)(2).

Once the Reserve Component member begins receiving retired pay at age 60 and does not change the election or, not having made an election, fails to make an election at that point, the election or “non-election” is irrevocable after the expiration of one (1) year from the date of first receiving retired pay.

SBP ENROLLMENT “OPEN SEASONS”

The only way that a SM can make an election for coverage or to increase his base coverage amount after twelve months after he begins (1) receiving retired pay (retires if active duty; turns 60 if a reservist); (2) his divorce without a former spouse designation; or (3) his remarriage without naming a beneficiary is if Congress declares an “open season” for members to make such elections.

The first such “open season” since 2000 was declared by the Congress and commenced on October 1, 2005 and ended on September 30, 2006. It is generally limited, however, to starting and/or upgrading spouse, spouse and child or child coverage, but will not be open for SMs to cancel their coverage. The available information is conflicting as to whether or not it was open *for SMs to correct (or be forced to correct) their failure make designate former spouse or former spouse and children court-ordered coverages*. So, in the future, if you find your client in an “open season”, try to force the issue by filing a Motion to Enforce, but realize that the expense, if your FS client is to pay all or part of the cost, may be a very expensive “buy-in.” The “buy-in” cost during the “open season” has generally been the amount of all of the back premiums from the date of the SM’s retirement plus interest, either as lump sum or in 24 monthly installments. SMs (and the FSs) will also then begin paying the same percentage of the monthly premium they would each have been paying at this point if they had enrolled in SBP when first eligible.

MEDICAL AND COMMISSARY BENEFITS FOR MILITARY DIVORCEES
(10 U.S.C. §§1062, 1072, 1076, 1077)

A. COMMISSARY AND EXCHANGE PRIVILEGES FOR FORMER SPOUSES
(10 U.S.C. §§1062, 1072):

The unremarried former spouse is entitled to commissary and military exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the Uniformed Services if the unremarried former spouse had been married to the member or former member for a period of at least 20 years during which period the member or former member performed at least 20 years of creditable service toward eligibility for retired or retainer pay on the date of the final decree of divorce, dissolution, or annulment. (10 U.S.C. §1062). The term "date of final decree of divorce, dissolution, or annulment" presumably means the date the decree was signed, but could mean the date the decree was judicially rendered if the decree is "ministerially signed" on a later date and the decree so provides.

The rule for commissary and exchange privilege benefits for former spouses is often referred to as the **20-20 Rule or the 20-20-20 Rule--20 years of creditable or qualifying military service, 20 years of marriage, and 20 years of overlap or concurrence of the two.**

B. MEDICAL AND DENTAL BENEFITS FOR FORMER SPOUSES OF ACTIVE DUTY MEMBERS (10 U.S.C. §§1072, 1076, 1077):

Dependents are entitled to receive the types of medical and dental care listed in 10 U.S.C. §1077 in medical and dental facilities of the uniformed services subject to availability of space and facilities and the capabilities of the medical and dental staff. 10 U.S.C. §1076. There are three categories of former spouses who qualify as "dependents" as defined in 10 U.S.C. §1072(2)(F)-(H).

The first category applies to an unremarried former spouse of a service member or former service member who was married to the service member for a period of at least 20 years during which period the service member had performed at least 20 years of creditable service on the date of the final decree of divorce,

dissolution, or annulment, **AND** who *does not have medical coverage under an employer-sponsored health plan*. 10 U.S.C. §1072(2)(F).

The second category applies to an unremarried former spouse whose date of final decree of divorce, dissolution or annulment was *prior to April 1, 1985*, **AND** who was previously married to a service member who, at the time of divorce, had performed at least 20 years of creditable service, **AND** whose marriage to the service member lasted for a period of at least 20 years, at least 15 but less than 20 of which were during the period when the service member performed creditable service toward retirement, **AND** who *does not have medical coverage under an employer-sponsored health plan*. 10 U.S.C. §1072(2)(G).

The third category applies to an unremarried former spouse whose date of final decree of divorce, dissolution or annulment was *on or after April 1, 1985*, **AND** who was previously married to a service member who, at the time of divorce, had performed at least 20 years of creditable service, **AND** whose marriage to the service member lasted for a period of at least 20 years, at least 15 but less than 20 of which were during the period when the service member performed creditable service toward retirement, **AND** *who does not have medical coverage under an employer's sponsored health plan, except that the unremarried former spouse's entitlement to medical benefits ends after the end of the one year period beginning on the date of the final decree*. 10 U.S.C. 1072(2)(H). *Thus, if the divorce occurred on or after April 1, 1985, this category of unremarried former spouses is entitled to medical care for only one year.*

All other former spouses who do not otherwise qualify for medical coverage pursuant to paragraphs 2-4 above, are entitled to COBRA conversion coverage. 29 U.S.C. §§ 1161-1163.

C. MEDICAL AND DENTAL BENEFITS FOR FORMER SPOUSES OF RESERVE COMPONENT MEMBERS (10 U.S.C. §1076):

Former spouses who qualify as dependents under the provisions of 10 U.S.C. §1072(2)(F) are entitled to the same medical and dental care as a former spouse (dependent) of an active duty member once the Reserve Component member attains age 60. 10 U.S.C. §1076(b).

2. If the Reserve Component member dies before attaining age 60, but, at the time of the Reserve Component member's death, the member was not eligible for retired pay solely because he was under 60 years of age, the former spouse is entitled to medical and dental care to the same extent as a dependent described in §1072(2)(F) when the Reserve Component member would have attained age 60. 10 U.S.C. §1076(b)(2).

Appendix P is a detailed chart summarizing the military medical, exchange, commissary and other benefits available to former spouses.

APPLYING FOR DIRECT PAY WITH DFAS

The package of forms for submission to the DFAS to register the FS's interest in a SM's military retired pay are located at the following **Appendices**:

- Q** DD Form 2293, Application For Former Spouse Payments From Retired Pay
<http://www.dtic.mil/whs/directives/infomgt/forms/e/forms/dd2293.pdf>
- R** W-4P, Withholding Certificate for Pension or Annuity Payments
<http://www.irs.gov/pub/irs-pdf/fw4p.pdf>
- S** DD DFAS-CL Form 1059 , Direct Deposit Authorization
<http://www.dod.mil/dfas/money/garnish/1059.pdf>
- T** Sample Letter to the DFAS regarding registration of Former Spouse's entitlement to Direct Pay of Court-ordered award of military retired pay
- U** Sample Certificate of Finality of Court Order

The documents that should be submitted to the DFAS to register the FS as a "former spouse beneficiary" of the SM's Survivor Benefit Plan survivorship annuity are located at the following **Appendices**:

- V** DD Form 2656-1, Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage
<http://www.dtic.mil/whs/directives/infomgt/forms/e/forms/dd2656-1.pdf>
- W** DD Form 2656-9, Survivor Benefit Plan (SBP) and Reserve Component Survivor Benefit Plan (RCSBP) Open Enrollment Election can be found at:

<http://www.uscg.mil/hq/psc/customerconnection/sbpopenrollment.htm> or the downloadable form in a Adobe format at:
<http://www.dtic.mil/whs/directives/infomgt/forms/forms/dd2656-9.pdf>

- X Sample Letter to the DFAS regarding registration of Survivor Benefit Plan election for FS coverage
- Y Sample Agreement to Name Former Spouse Beneficiary under the Armed Forces Survivor Benefit Plan [for SMs who will agree to sign the form]

Some of the forms provided with this paper, as well as other related forms can also be found in **Chapter 19** of the **Texas Family Law Practice Manual**, which also has additional explanatory comments and useful forms related to the issue of dividing military retirement.

PREVENTING MALPRACTICE

Because of the importance of the military retirement as an asset, but usually the most valuable marital asset in a military divorce, IT IS IMPERATIVE that you ensure you are competent to represent your client's interest in it. You must first know how to properly value it. It is even more important, however, to ensure that once the military retirement asset is divided, and the decree is drafted and signed by the Court, that you have properly worded the language treating the military retired pay, Survivor Benefit Plan and related assets fully and completely and as favorable as possible for your client, whether the SM or the FS. This is a fertile ground for you to slip and slid into a malpractice trap, so avoid that by associating competent qualified counsel to ensure that your day is not ruined by a phone call or the receipt of papers requesting you to file an answer to your former client's lawsuit against you several years later.

BASIC PAY—EFFECTIVE JANUARY 1, 2007¹

Cumulative Years of Service

Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18	Over 20	Over 22	Over 24	Over 26
O-10 ²												13,659.00	13,725.90	14,011.20	14,508.60
O-9												11,946.60	12,118.50	12,367.20	12,801.30
O-8	8,453.10	8,729.70	8,913.60	8,964.90	9,194.10	9,577.20	9,666.30	10,030.20	10,134.30	10,447.80	10,900.80	11,319.00	11,598.30	11,598.30	11,598.30
O-7	7,023.90	7,350.00	7,501.20	7,621.20	7,838.40	8,052.90	8,301.30	8,548.80	8,797.20	9,577.20	10,236.00	10,236.00	10,236.00	10,236.00	10,287.90
O-6	5,206.20	5,719.20	6,094.50	6,094.50	6,117.60	6,380.10	6,414.60	6,414.60	6,779.10	7,423.80	7,802.10	8,180.10	8,395.20	8,613.00	9,035.70
O-5	4,339.80	4,888.80	5,227.50	5,291.10	5,502.00	5,628.60	5,906.40	6,110.10	6,373.20	6,776.40	6,968.10	7,158.00	7,373.10	7,373.10	7,373.10
O-4	3,744.60	4,334.70	4,623.90	4,688.40	4,956.90	5,244.60	5,602.80	5,882.40	6,076.20	6,187.50	6,252.30	6,252.30	6,252.30	6,252.30	6,252.30
O-3	3,292.20	3,732.30	4,028.40	4,392.00	4,602.00	4,833.00	4,982.70	5,228.40	5,355.90	5,355.90	5,355.90	5,355.90	5,355.90	5,355.90	5,355.90
O-2	2,844.30	3,239.70	3,731.40	3,857.40	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60
O-1	2,469.30	2,569.80	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50
O-3 ³				4,392.00	4,602.00	4,833.00	4,982.70	5,228.40	5,435.40	5,554.20	5,715.90				
O-2 ³				3,857.40	3,936.60	4,062.00	4,273.50	4,437.00	4,558.80	4,558.80	4,558.80				
O-1 ³				3,106.50	3,317.70	3,440.10	3,565.50	3,688.80	3,857.40	3,857.40	3,857.40				
W-5												5,845.80	6,046.50	6,247.50	6,450.00
W-4	3,402.00	3,660.00	3,765.00	3,868.50	4,046.40	4,222.20	4,400.70	4,574.10	4,753.80	5,035.50	5,215.80	5,392.20	5,574.90	5,754.90	5,938.80
W-3	3,106.80	3,236.40	3,369.00	3,412.80	3,552.00	3,711.30	3,921.60	4,129.20	4,350.00	4,515.60	4,680.60	4,751.40	4,824.60	4,984.20	5,143.20
W-2	2,732.70	2,888.70	3,025.50	3,124.50	3,209.70	3,443.70	3,622.50	3,755.10	3,885.00	3,973.80	4,048.80	4,191.00	4,332.30	4,475.40	4,475.40
W-1	2,413.20	2,610.60	2,742.90	2,828.40	3,056.10	3,193.50	3,315.30	3,451.20	3,541.20	3,622.80	3,755.40	3,856.20	3,856.20	3,856.20	3,856.20
E-9 ⁴							4,110.60	4,203.90	4,321.20	4,459.50	4,598.40	4,821.60	5,010.30	5,209.20	5,512.80
E-8							3,364.80	3,513.90	3,606.00	3,716.40	3,835.80	4,051.80	4,161.30	4,347.30	4,450.50
E-7	2,339.10	2,553.00	2,650.80	2,780.70	2,881.50	3,055.20	3,152.70	3,250.20	3,424.20	3,511.20	3,593.70	3,644.10	3,814.80	3,925.20	4,204.20
E-6	2,023.20	2,226.00	2,324.40	2,419.80	2,519.40	2,744.10	2,831.40	2,928.30	3,013.50	3,043.50	3,064.50	3,064.50	3,064.50	3,064.50	3,064.50
E-5	1,854.00	1,977.90	2,073.30	2,171.40	2,323.80	2,454.90	2,551.50	2,582.10	2,582.10	2,582.10	2,582.10	2,582.10	2,582.10	2,582.10	2,582.10
E-4	1,699.50	1,786.50	1,883.10	1,978.50	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80
E-3	1,534.20	1,630.80	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20
E-2	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90
E-1 ⁵	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40

Notes:

- Basic pay for an O-7 to O-10 is limited by Level II of the Executive Schedule which is \$14,000.10. Basic pay for O-6 and below is limited by Level V of the Executive Schedule which is \$11,349.90.
- While serving as Chairman, Joint Chief of Staff/Vice Chairman, Joint Chief of Staff, Chief of Navy Operations, Commandant of the Marine Corps, Army/Air Force Chief of Staff, Commander of a unified or specified combatant command, basic pay is \$15,959.40 (See note 1 above).
- Applicable to O-1 to O-3 with at least 4 years and 1 day of active duty or more than 1460 points as a warrant and/or enlisted member. See Department of Defense Financial Management Regulations for more detailed explanation on who is eligible for this special basic pay rate.
- For the Master Chief Petty Officer of the Navy, Chief Master Sergeant of the AF, Sergeant Major of the Army or Marine Corps or Senior Enlisted Advisor of the JCS, basic pay is \$6,642.60. Combat Zone Tax Exclusion for O-1 and above is based on this basic pay rate plus Hostile Fire Pay/Imminent Danger Pay which is \$225.00.
- Applicable to E-1 with 4 months or more of active duty. Basic pay for an E-1 with less than 4 months of active duty is \$1,203.90.

APPENDIX B

High-3 year Base Pay calculation in case of Service Member

Beginning Date	Ending Date	No. of Months		Applicable Base Pay	Pay for Applicable Period
9/1/1998	10/26/1998	1.5	O-4 > 16	\$4,290.30	\$6,435.45
1/1/1998	8/31/1998	8	O-3E > 16	\$3,868.80	\$30,950.40
1/1/1997	12/31/1997	12	O-3E > 14	\$3,763.50	\$45,162.00
3/1/1996	12/31/1996	10	O-3E > 14	\$3,654.00	\$36,540.00
2/2/1996	2/29/1996	1	O-3E > 14	\$3,663.15	\$3,663.15
1/1/1996	2/1/1996	1	O-3E > 12	\$3,500.70	\$3,500.70
10/26/1996	12/31/1995	2.5	O-3E > 12	\$3,432.00	\$8,580.00
Total		36		Base Pay for 36 Mos. =	\$134,831.70
				divided by	36
				Monthly High-3 Base Pay	\$3,745.33

High-3 year Base Pay calculation in case of Service Member

Beginning Date	Ending Date	No. of Months		Applicable Base Pay	Pay for Applicable Period
1/1/2004	12/31/2004	12	O-4 > 14	\$5,571.60	\$66,859.20
8/16/2003	12/31/2003	7.5	O-4 > 14	\$5,372.70	\$40,295.25
1/1/2003	8/15/2003	4.5	O-4 > 12	\$5,201.40	\$23,406.30
1/1/2002	12/31/2002	12	O-4 > 12	\$5,073.30	\$60,879.60
Total		36		Base Pay for 36 Mos. =	\$191,440.35
					36
				Monthly High-3 Base Pay	\$5,317.79

How to read an active duty Army, Navy or Air Force Leave and Earning Statement

Your pay is your responsibility.

This is a guide to help you understand your Leave and Earnings Statement (LES). The LES is a comprehensive statement of a member's leave and earnings showing your entitlements, deductions, allotments (fields not used for Reserve and National Guard members), leave information, tax withholding information, and Thrift Savings Plan (TSP) information. Your most recent LES can be found 24 hours a day on *myPay*.

If members receive Career Sea Pay, the Sea Service Counter will still be displayed in the remark portion of the LES. The LES remains one page in length.

Verify and keep your LES each month. If your pay varies significantly and you don't understand why, or if you have any questions after reading this publication, consult with your disbursing/finance office.

DEFENSE FINANCE AND ACCOUNTING SERVICE MILITARY LEAVE AND EARNINGS STATEMENT																									
ID	NAME (LAST, FIRST, MI)			SOC SEC NO.	GRADE	PAY DATE	YRS SVC	ETS	BRANCH	ADJN/DSSN	PERIOD COVERED														
ENTITLEMENTS				DEDUCTIONS				ALLOTMENTS				SUMMARY													
TYPE		AMOUNT		TYPE		AMOUNT		TYPE		AMOUNT		-		AMT FWD		13									
MEMBER'S COMMENTS	10				11				12				= TOT ENT		14										
													= TOT DED		15										
													= TOT ALMT		16										
													= NET AMT		17										
													= CR FWD		18										
													= ECON PAY		19										
TOTAL		20		21		22		23		24		DIENS		RET PLAN											
LEAVE		SF BAL	ENND	USED	CR BAL	ETS BAL	LV LOST	LV PAID	USE LOSE	FED TAXES		WAGE PERIOD	WAGE YTD	MIS	EX	ADD'L TAX	TAX YTD								
		25	26	27	28	29	30	31	32	33		34	35	36	37	38									
FICA TAXES		WAGE PERIOD		SOC WAGE YTD		SOC TAN YTD		MED WAGE YTD		MED TAN YTD		STATE TAXES		ST	WAGE PERIOD	WAGE YTD	MIS	EX	TAN YTD						
		39		40		41		42		43		44		45	46	47	48	49							
PAY DATA		BAQ TYPE	BAQ DEPN	VHA ZIP	RENT AMT	SHARE	STAT	JFTR	DEPN	2D JFTR	BAQ TYPE	CHARITY YTD		TFC	PACIGN										
		50	51	52	53	54	55	56	57	58	59	60		61	62										
Thrift Savings Plan (TSP)		BASE PAY RATE		BASE PAY CURRENT		SPEC PAY RATE		SPEC PAY CURRENT		INC PAY RATE		INC PAY CURRENT		BONUS PAY RATE		BONUS PAY CURRENT									
		63		64		65		66		67		68		69		70									
		CURRENTLY NOT USED				TSP YTD DEDUCTIONS				DEFERRED				EEMPT				CURRENTLY NOT USED							
		71				72				73				74				75							
REMARKS		YTD ENTITLE						YTD DEDUCT																	
		76						77						78											

Fields 1 - 9 contain the identification portion of the LES.

- **1 NAME:** The member's name in last, first, middle initial format.
- **2 SOC. SEC. NO.:** The member's Social Security Number.
- **3 GRADE:** The member's current pay grade.
- **4 PAY DATE:** The date the member entered active duty for pay purposes in YYMMDD format. This is synonymous with the Pay Entry Base Date (PEBD).
- **5 YRS SVC:** In two digits, the actual years of creditable service.
- **6 ETS:** The Expiration Term of Service in YYMMDD format. This is synonymous with the Expiration of Active Obligated Service (EAOS).
- **7 BRANCH:** The branch of service, i.e., Navy, Army, Air Force.
- **8 ADSN/DSSN:** The Disbursing Station Symbol Number used to identify each disbursing/finance office.
- **9 PERIOD COVERED:** This is the period covered by the individual LES. Normally it will be for one calendar month. If this is a separation LES, the separation date will appear in this field.

Fields 10 through 24 contain the entitlements, deductions, allotments, their respective totals, a mathematical summary portion, date initially entered military service, and retirement plan.

- **10 ENTITLEMENTS:** In columnar style the names of the entitlements and allowances being paid. Space is allocated for fifteen entitlements and/or allowances. If more than fifteen are present the overflow will be printed in the remarks block. Any retroactive entitlements and/or allowances will be added to like entitlements and/or allowances.
- **11 DEDUCTIONS:** The description of the deductions are listed in columnar style. This includes items such as taxes, SGLI, Mid-month pay and dependent dental plan. Space is allocated for fifteen deductions. If more than fifteen are present the overflow will be printed in the remarks block. Any retroactive deductions will be added to like deductions.
- **12 ALLOTMENTS:** In columnar style the type of the actual allotments being deducted. This includes discretionary and non-discretionary allotments for savings and/or checking accounts, insurance, bonds, etc. Space is allocated for fifteen allotments. If a member has more than one of the same type of allotment, the only differentiation may be that of the dollar amount.
- **13 +AMT FWD:** The amount of all unpaid pay and allowances due from the prior LES.
- **14 + TOT ENT:** The figure from Field 20 that is the total of all entitlements and/or allowances listed.
- **15 -TOT DED:** The figure from Field 21 that is the total of all deductions.
- **16 -TOT ALMT:** The figure from Field 22 that is the total of all allotments.
- **17 = NET AMT:** The dollar value of all unpaid pay and allowances, plus total entitlements and/or allowances, minus deductions and allotments due on the current LES.
- **18 - CR FWD:** The dollar value of all unpaid pay and allowances due to reflect on the next LES as the +AMT FWD.
- **19 = EOM PAY:** The actual amount of the payment to be paid to the member on End-of-Month payday.
- **20 - 22 TOTAL:** The total amounts for the entitlements and/or allowances, deductions and allotments respectively.
- **23 DIEMS:** Date initially entered military service: This date is used SOLELY to indicate which retirement plan a member is under. For those members with a DIEMS date prior to September 8, 1980, they are under the FINAL PAY retirement plan. For those members with a DIEMS date of September 8, 1980 through July 31, 1986, they are under the HIGH-3 retirement plan. For those members with a DIEMS date of August 1, 1986 or later, they were initially under the REDUX retirement plan. This was changed by law in October 2000, when they were placed under the HIGH-3 plan, with the OPTION to return to the REDUX plan. In consideration of making this election, they become entitled to a \$30,000 Career Service Bonus. The data in this block comes from PERSCOM. DFAS is not responsible for the accuracy of this data. If a member feels that the DIEMS date shown in this block is erroneous, they must see their local servicing Personnel Office for corrective action.
- **24 RET PLAN:** Type of retirement plan, i.e. Final Pay, High 3, REDUX; or CHOICE (CHOICE reflects members who have less than 15 years service and have not elected to go with REDUX or stay with their current retirement plan).

Fields 25 through 32 contain leave information.

- **25 BF BAL:** The brought forward leave balance. Balance may be at the beginning of the fiscal year, or when active duty began, or the day after the member was paid Lump Sum Leave (LSL).
- **26 ERND:** The cumulative amount of leave earned in the current fiscal year or current term of enlistment if the member reenlisted/extended since the beginning of the fiscal year. Normally increases by 2.5 days each month.
- **27 USED:** The cumulative amount of leave used in the current fiscal year or current term of enlistment if member reenlisted/extended since the beginning of the fiscal year.
- **28 CR BAL:** The current leave balance as of the end of the period covered by the LES.
- **29 ETS BAL:** The projected leave balance to the member's Expiration Term of Service (ETS).

- **30 LV LOST:** The number of days of leave that has been lost.
- **31 LV PAID:** The number of days of leave paid to date.
- **32 USE/LOSE:** The projected number of days of leave that will be lost if not taken in the current fiscal year on a monthly basis. The number of days of leave in this block will decrease with any leave usage.

Fields 33 through 38 contain Federal Tax withholding information.

- **33 WAGE PERIOD:** The amount of money earned this LES period that is subject to Federal Income Tax Withholding (FITW).
- **34 WAGE YTD:** The money earned year-to-date that is subject to FITW. Field 35 M/S. The marital status used to compute the FITW.
- **36 EX:** The number of exemptions used to compute the FITW.
- **37 ADD'L TAX:** The member specified additional dollar amount to be withheld in addition to the amount computed by the Marital Status and Exemptions.
- **38 TAX YTD:** The cumulative total of FITW withheld throughout the calendar year.

Fields 39 through 43 contain Federal Insurance Contributions Act (FICA) information.

- **39 WAGE PERIOD:** The amount of money earned this LES period that is subject to FICA.
- **40 SOC WAGE YTD:** The wages earned year-to-date that are subject to FICA.
- **41 SOC TAX YTD:** Cumulative total of FICA withheld throughout the calendar year.
- **42 MED WAGE YTD:** The wages earned year-to-date that are subject to Medicare.
- **43 MED TAX YTD:** Cumulative total of Medicare taxes paid year-to-date.

Fields 44 through 49 contain State Tax information.

- **44 ST:** The two digit postal abbreviation for the state the member elected.
- **45 WAGE PERIOD:** The amount of money earned this LES period that is subject to State Income Tax Withholding (SITW).
- **46 WAGE YTD:** The money earned year-to-date that is subject to SITW. Field 47 M/S. The marital status used to compute the SITW.
- **48 EX:** The number of exemptions used to compute the SITW.
- **49 TAX YTD:** The cumulative total of SITW withheld throughout the calendar year.

Fields 50 through 62 contain additional Pay Data.

- **50 BAQ TYPE:** The type of Basic Allowance for Quarters being paid.
- **51 BAQ DEPN:** A code that indicates the type of dependent. A - Spouse C - Child D - Parent G - Grandfathered I - Member married to member/own right K - Ward of the court L - Parents in Law R - Own right S - Student (age 21-22) T - Handicapped child over age 21 W - Member married to member, child under 21
- **52 VHA ZIP:** The zip code used in the computation of Variable Housing Allowance (VHA) if entitlement exists.
- **53 RENT AMT:** The amount of rent paid for housing if applicable.
- **54 SHARE:** The number of people with which the member shares housing costs.
- **55 STAT:** The VHA status; i.e., accompanied or unaccompanied.
- **56 JFTR:** The Joint Federal Travel Regulation (JFTR) code based on the location of the member for Cost of Living Allowance (COLA) purposes.
- **57 DEPNS:** The number of dependents the member has for VHA purposes.
- **58 2D JFTR:** The JFTR code based on the location of the member's dependents for COLA purposes.
- **59 BAS TYPE:** An alpha code that indicates the type of Basic Allowance for Subsistence (BAS) the member is receiving, if applicable. This field will be blank for officers.
 - B - Separate Rations
 - C - TDY/PCS/Proceed Time
 - H - Rations-in-kind not available
 - K - Rations under emergency conditions
- **60 CHARITY YTD:** The cumulative amount of charitable contributions for the calendar year.
- **61 TPC:** This field is not used by the active component of any branch of service.
- **62 PACIDN:** The activity Unit Identification Code (UIC). This field is currently used by Army only.

Fields 63 through 75 contain Thrift Savings Plan (TSP) information/data.

- **63 BASE PAY RATE:** The percentage of base pay elected for TSP contributions.
- **64 BASE PAY CURRENT:** Reserved for future use.
- **65 SPECIAL PAY RATE:** The percentage of Specialty Pay elected for TSP contribution.

- **66 SPECIAL PAY CURRENT:** Reserved for future use.
- **67 INCENTIVE PAY RATE:** Percentage of Incentive Pay elected for TSP contribution.
- **68 INCENTIVE PAY CURRENT:** Reserved for future use.
- **69 BONUS PAY RATE:** The percentage of Bonus Pay elected towards TSP contribution.
- **70 BONUS PAY CURRENT:** Reserved for future use.
- **71** Reserved for future use.
- **72 TSP YTD DEDUCTION (TSP YEAR TO DATE DEDUCTION):** Dollar amount of TSP contributions deducted for the year.
- **73 DEFERRED:** Total dollar amount of TSP contributions that are deferred for tax purposes.
- **74 EXEMPT:** Dollar amount of TSP contributions that are reported as tax exempt to the Internal Revenue Service (IRS).
- **75** Reserved for future use

76 REMARKS: This area is used to provide you with general notices from varying levels of command, as well as the literal explanation of starts, stops, and changes to pay items in the entries within the "ENTITLEMENTS", "DEDUCTIONS", and "ALLOTMENTS" fields.

77 YTD ENTITLE: The cumulative total of all entitlements for the calendar year.

78 YTD DEDUCT: The cumulative total of all deductions for the calendar year.

How to read an active duty Marine Corps Leave and Earning Statement

Your pay is your responsibility.

This is a guide to help you understand your Leave and Earnings Statement (LES). The LES is a comprehensive statement of a member's leave and earnings showing your entitlements, deductions, allotments (fields not used for Reserve and National Guard members), leave information, tax withholding information, and Thrift Savings Plan (TSP) information. Your most recent LES can be found 24 hours a day on *myPay*.

If members receive Career Sea Pay, the Sea Service Counter will still be displayed in the remark portion of the LES. The LES remains one page in length.

Verify and keep your LES each month. If your pay varies significantly and you don't understand why, or if you have any questions after reading this publication, consult with your disbursing/finance office.

MARINE CORPS TOTAL FORCE LEAVE AND EARNINGS STATEMENT

A ID DIST REC INFO		1 NAME (LAST, FIRST, MI)		2 SSN		3 RANK		4 SERV		5 PLT CODE		6 DATE PREP		7 PRD COVERED		8 PERD		9 YRS		10 EAS		11 ECC		12 MCC																																			
B FORCAST AMOUNTS		13 DATE		14 AMOUNT		15 START DATE		16 AMOUNT		17 BALANCE		18 POE		D DIRECT DEPOSIT/FEED ADDRESS																																													
E LEAVE INFORMATION												F AVIATION PAY INFORMATION																																															
19 LYBE INFO		20 EARNED		21 USED		22 EXCESS		23 BAL		24 MAX		25 LOST		26 SOLICIT OF		27 CBT LV		28 OFFICER		29 AVIATOR		30 ACCUM OP		31 OP FLY TIME		32 OP FLY GATE																																	
33 STATE TAX		34 FEDERAL TAX		35 FICA (SOCIAL SECURITY TAX)		36 SSEC WAGES THIS PRD		37 SSEC WAGES YTD		38 MEDICARE WAGES THIS PRD		39 MEDICARE WAGES YTD		G RIGHTS OF MARINES INDEBTED TO THE YOU HAVE THE RIGHT TO: -Pay for and copy records pertaining to debt -Question validity of a debt and obtain refund evidence -Negotiate a repayment schedule -Request a waiver of debt More information about your rights can be obtained from your Commanding Officer or your Chain of Command.																																													
H GOVERNMENT												I TAX INFORMATION												J RIGHTS OF MARINES INDEBTED TO THE																																			
40 STATE CODE		41 EXEMPTIONS		42 WAGES THIS PRD		43 WAGES YTD		44 STATE TAX YTD		45 EXEMPTIONS		46 WAGES THIS PRD		47 WAGES YTD		48 FED TAX YTD		49 SSEC WAGES THIS PRD		50 SSEC WAGES YTD		51 MEDICARE WAGES THIS PRD		52 MEDICARE WAGES YTD		53 MEDICARE TAX YTD		K YOU HAVE THE RIGHT TO: -Pay for and copy records pertaining to debt -Question validity of a debt and obtain refund evidence -Negotiate a repayment schedule -Request a waiver of debt More information about your rights can be obtained from your Commanding Officer or your Chain of Command.																															
L INFO												M ADDITIONAL BAH INFORMATION												N CARRIERS SEA PAY												O EDUCATION DEDUCTION												P ADMIN											
54 BAR		55 TD		56 92		57 42		58 42		59 DATE		60 TOTAL CAREER SEA SVC		61 TYPE		62 MONTHLY AMT		63 TOTAL		64 PAY STATUS																																							
65 PAY												66 CBA DATE												67 RESERVE DRILL INFORMATION												68 RESERVE RETIREMENT INFORMATION																							
69 REC		70 REC		71 REC		72 ADD		73 ADD		74 BE		75 ACQU		76 DRILL		77 OTHER		78 MRE		79 EN BAL		80 TOTAL		81 TOTAL		82 RESERVE ECC																																	
83 DRSN		84 FYTD		85 ANNYTD		86 FYTD		87 ANNYTD		88 ANNYTD		89 THIS PRD		90 THIS PRD		91 THIS PRD		92 THIS PRD		93 ANNYTD		94 SAT YRS		95 RET PPS		96 RESERVE ECC																																	

C REMARKS

Fields 1 - 9 contain the identification portion of the LES.

- **Field 1 NAME.** The member's name in last, first, middle initial format.
- **Field 2 SOC. SEC. NO.** The member's Social Security Number.
- **Field 3 GRADE.** The member's current pay grade.
- **Field 4 PAY DATE.** The date the member entered active duty for pay purposes in YYMMDD format. This is synonymous with the Pay Entry Base Date (PEBD). Field 5 YRS SVC. In two digits, the actual years of creditable service.
- **Field 6 ETS.** The Expiration Term of Service in YYMMDD format. This is synonymous with the Expiration of Active Obligated Service (EAOS).
- **Field 7 BRANCH.** The branch of service, i.e., Navy, Army, Air Force.
- **Field 8 ADSN/DSSN.** The Disbursing Station Symbol Number used to identify each disbursing/finance office.
- **Field 9 PERIOD COVERED.** This is the period covered by the individual LES. Normally it will be for one calendar month. If this is a separation LES, the separation date will appear in this field.

Fields 10 through 24 contain the entitlements, deductions, allotments, their respective totals, a mathematical summary portion, date initially entered military service, and retirement plan.

- **Field 10 ENTITLEMENTS.** In columnar style the names of the entitlements and allowances being paid. Space is allocated for fifteen entitlements and/or allowances. If more than fifteen are present the overflow will be printed in the remarks block. Any retroactive entitlements and/or allowances will be added to like entitlements and/or allowances.
- **Field 11 DEDUCTIONS.** The description of the deductions are listed in columnar style. This includes items such as taxes, SGLI, Mid-month pay and dependent dental plan. Space is allocated for fifteen deductions. If more than fifteen are present the overflow will be printed in the remarks block. Any retroactive deductions will be added to like deductions.
- **Field 12 ALLOTMENTS.** In columnar style the type of the actual allotments being deducted. This includes discretionary and non-discretionary allotments for savings and/or checking accounts, insurance, bonds, etc. Space is allocated for fifteen allotments. If a member has more than one of the same type of allotment, the only differentiation may be that of the dollar amount.
- **Field 13 +AMT FWD.** The amount of all unpaid pay and allowances due from the prior LES.
- **Field 14 + TOT ENT.** The figure from Field 20 that is the total of all entitlements and/or allowances listed.
- **Field 15 -TOT DED.** The figure from Field 21 that is the total of all deductions.
- **Field 16 -TOT ALMT.** The figure from Field 22 that is the total of all allotments.
- **Field 17 = NET AMT.** The dollar value of all unpaid pay and allowances, plus total entitlements and/or allowances, minus deductions and allotments due on the current LES. Field 18 - CR FWD. The dollar value of all unpaid pay and allowances due to reflect on the next LES as the +AMT FWD.
- **Field 19 - EOM PAY.** The actual amount of the payment to be paid to the member on End-of-Month payday.
- **Fields 20 - 22 TOTAL.** The total amounts for the entitlements and/or allowances, deductions and allotments respectively.
- **Field 23 DIEMS.** Date initially entered military service: This date is used SOLELY to indicate which retirement plan a member is under. For those members with a DIEMS date prior to September 8, 1980, they are under the FINAL PAY retirement plan. For those members with a DIEMS date of September 8, 1980 through July 31, 1986, they are under the HIGH-3 retirement plan. For those members with a DIEMS date of August 1, 1986 or later, they were initially under the REDUX retirement plan. This was changed by law in October 2000, when they were placed under the HIGH-3 plan, with the OPTION to return to the REDUX plan. In consideration of making this election, they become entitled to a \$30,000 Career Service Bonus. The data in this block comes from PERSCOM. DFAS is not responsible for the accuracy of this data. If a member feels that the DIEMS date shown in this block is erroneous, they must see their local servicing Personnel Office for corrective action.
- **Field 24 RET PLAN.** Type of retirement plan, i.e. Final Pay, High 3, REDUX; or CHOICE (CHOICE reflects members who have less than 15 years service and have not elected to go with REDUX or stay with their current retirement plan).

Fields 25 through 32 contain leave information.

- **Field 25 BF BAL.** The brought forward leave balance. Balance may be at the beginning of the fiscal year, or when active duty began, or the day after the member was paid Lump Sum Leave (LSL).
- **Field 26 ERND.** The cumulative amount of leave earned in the current fiscal year or current term of enlistment if the member reenlisted/extended since the beginning of the fiscal year. Normally increases by 2.5 days each month.
- **Field 27 USED.** The cumulative amount of leave used in the current fiscal year or current term of enlistment if member reenlisted/extended since the beginning of the fiscal year.
- **Field 28 CR BAL.** The current leave balance as of the end of the period covered by the LES.

- **Field 29 ETS BAL.** The projected leave balance to the member's Expiration Term of Service (ETS).
- **Field 30 LV LOST.** The number of days of leave that has been lost.
- **Field 31 LV PAID.** The number of days of leave paid to date.
- **Field 32 USE/LOSE.** The projected number of days of leave that will be lost if not taken in the current fiscal year on a monthly basis. The number of days of leave in this block will decrease with any leave usage.

Fields 33 through 38 contain Federal Tax withholding information.

- **Field 33 WAGE PERIOD.** The amount of money earned this LES period that is subject to Federal Income Tax Withholding (FITW).
- **Field 34 WAGE YTD.** The money earned year-to-date that is subject to FITW. Field 35 M/S. The marital status used to compute the FITW.
- **Field 36 EX.** The number of exemptions used to compute the FITW.
- **Field 37 ADD'L TAX.** The member specified additional dollar amount to be withheld in addition to the amount computed by the Marital Status and Exemptions.
- **Field 38 TAX YTD.** The cumulative total of FITW withheld throughout the calendar year.

Fields 39 through 43 contain Federal Insurance Contributions Act (FICA) information.

- **Field 39 WAGE PERIOD.** The amount of money earned this LES period that is subject to FICA.
- **Field 40 SOC WAGE YTD.** The wages earned year-to-date that are subject to FICA.
- **Field 41 SOC TAX YTD.** Cumulative total of FICA withheld throughout the calendar year.
- **Field 42 MED WAGE YTD.** The wages earned year-to-date that are subject to Medicare.
- **Field 43 MED TAX YTD.** Cumulative total of Medicare taxes paid year-to-date.

Fields 44 through 49 contain State Tax information.

- **Field 44 ST.** The two digit postal abbreviation for the state the member elected.
- **Field 45 WAGE PERIOD.** The amount of money earned this LES period that is subject to State Income Tax Withholding (SITW).
- **Field 46 WAGE YTD.** The money earned year-to-date that is subject to SITW. Field 47 M/S. The marital status used to compute the SITW.
- **Field 48 EX.** The number of exemptions used to compute the SITW.
- **Field 49 TAX YTD.** The cumulative total of SITW withheld throughout the calendar year.

Fields 50 through 62 contain additional Pay Data.

- **Field 50 BAQ TYPE.** The type of Basic Allowance for Quarters being paid.
- **Field 51 BAQ DEPN.** A code that indicates the type of dependent. A - Spouse C -Child D - Parent G - Grandfathered I -Member married to member/own right K - Ward of the court L - Parents in Law R - Own right S - Student (age 21-22) T - Handicapped child over age 21 W - Member married to member, child under 21
- **Field 52 VHA ZIP.** The zip code used in the computation of Variable Housing Allowance (VHA) if entitlement exists.
- **Field 53 RENT AMT.** The amount of rent paid for housing if applicable.
- **Field 54 SHARE.** The number of people with which the member shares housing costs.
- **Field 55 STAT.** The VHA status; i.e., accompanied or unaccompanied.
- **Field 56 JFTR.** The Joint Federal Travel Regulation (JFTR) code based on the location of the member for Cost of Living Allowance (COLA) purposes.
- **Field 57 DEPNS.** The number of dependents the member has for VHA purposes.
- **Field 58 2D JFTR.** The JFTR code based on the location of the member's dependents for COLA purposes.
- **Field 59 BAS TYPE.** An alpha code that indicates the type of Basic Allowance for Subsistence (BAS) the member is receiving, if applicable. This field will be blank for officers.
 - B - Separate Rations
 - C - TDY/PCS/Proceed Time
 - H - Rations-in-kind not available
 - K - Rations under emergency conditions
- **Field 60 CHARITY YTD.** The cumulative amount of charitable contributions for the calendar year.
- **Field 61 TPC.** This field is not used by the active component of any branch of service.
- **Field 62 PACIDN.** The activity Unit Identification Code (UIC). This field is currently used by Army only.

Fields 63 through 75 contain Thrift Savings Plan (TSP) information/data.

- **Field 63 BASE PAY RATE.** The percentage of base pay elected for TSP contributions.
- **Field 64 BASE PAY CURRENT.** Reserved for future use.

- **Field 65 SPECIAL PAY RATE.** The percentage of Specialty Pay elected for TSP contribution.
- **Field 66 SPECIAL PAY CURRENT.** Reserved for future use.
- **Field 67 INCENTIVE PAY RATE.** Percentage of Incentive Pay elected for TSP contribution.
- **Field 68 INCENTIVE PAY CURRENT.** Reserved for future use.
- **Field 69 BONUS PAY RATE.** The percentage of Bonus Pay elected towards TSP contribution.
- **Field 70 BONUS PAY CURRENT.** Reserved for future use.
- **Field 71** Reserved for future use.
- **Field 72 TSP YTD DEDUCTION (TSP YEAR TO DATE DEDUCTION):** Dollar amount of TSP contributions deducted for the year.
- **Field 73 DEFERRED:** Total dollar amount of TSP contributions that are deferred for tax purposes.
- **Field 74 EXEMPT:** Dollar amount of TSP contributions that are reported as tax exempt to the Internal Revenue Service (IRS).
- **Field 75** Reserved for future use
- **Field 76 REMARKS.** This area is used to provide you with general notices from varying levels of command, as well as the literal explanation of starts, stops, and changes to pay items in the entries within the "ENTITLEMENTS", "DEDUCTIONS", and "ALLOTMENTS" fields.
- **Field 77 YTD ENTITLE.** The cumulative total of all entitlements for the calendar year. **Field 78 YTD DEDUCT.** The cumulative total of all deductions for the calendar year.

How to read a Reserve and National Guard Leave and Earning Statement

Your pay is your responsibility.

This is a guide to help you understand your Leave and Earnings Statement (LES). The LES is a comprehensive statement of a member's leave and earnings showing your entitlements, deductions, allotments (fields not used for Reserve and National Guard members), leave information, tax withholding information, and Thrift Savings Plan (TSP) information. Your most recent LES can be found 24 hours a day on **myPay**.

If members receive Career Sea Pay, the Sea Service Counter will still be displayed in the remark portion of the LES. The LES remains one page in length.

Verify and keep your LES each month. If your pay varies significantly and you don't understand why, or if you have any questions after reading this publication, consult with your disbursing/finance office.

DEFENSE FINANCE AND ACCOUNTING SERVICE MILITARY LEAVE AND EARNINGS STATEMENT																			
ID	NAME (LAST, FIRST, MI)			SOC SEC NO.	GRADE	PAY DATE	YRS SVC	ETS	BRANCH	ADJUTANT	PERIOD COVERED								
	1			2	3	4	5	6	7	8	9								
ENTITLEMENTS				DEDUCTIONS				ALLOTMENTS				SUMMARY							
TYPE		AMOUNT		TYPE		AMOUNT		TYPE		AMOUNT		+		-					
10				11				12				=ADJ PWD		13					
												-TOT ENT		14					
												-TOT DED		15					
												-TOT ALMT		16					
												=NET AMT		17					
												-CAFWD		18					
												=ECM PAY		19					
												DIENS		RET PLAN					
TOTAL		20		21		22		23		24									
LEAVE																			
EF BAL	ENDD	USED	CR BAL	ETS BAL	LV LOST	LV PAID	USELSE	FED TAXES		WAGE PERIOD	WAGE YTD	MS	EX	ADD'L TAX	TAX YTD				
25	26	27	28	29	30	31	32	33		34	35	36	37	38					
FICA TAXES																			
WAGE PERIOD		SOC WAGE YTD		SOC TAX YTD		MED WAGE YTD		MED TAX YTD		STATE TAXES		ST	WAGE PERIOD	WAGE YTD	MS	EX	TAX YTD		
39		40		41		42		43		44		45	46	47	48	49			
PAY DATA																			
BAQ TYPE		BAQ DEN		VEA ZIP		RENT AMT		SHARE	STAT	HTX	DEPNS	ID JTR	BAS TYPE		CHARITY YTD		SPC	PACEN	
50		51		52		53		54	55	56	57	58	59		60		61	62	
Thrift Savings Plan (TSP)																			
BASE PAY RATE		BASE PAY CURRENT		SPEC PAY RATE		SPEC PAY CURRENT		INC PAY RATE		INC PAY CURRENT		BONUS PAY RATE		BONUS PAY CURRENT					
63		64		65		66		67		68		69		70					
CURRENTLY NOT USED				TSP YTD DEDUCTIONS				DEFERRED				EXEMPT				CURRENTLY NOT USED			
71				72				73				74				75			
REMARKS																			
YTD ENTITLE				YTD DEDUCT															
76				77				78											

Fields 1 through 9 contain the identification portion of the LES.

- **1 - NAME.** The member's name in last, first, middle initial format.
- **2 - SOC. SEC. NO.** The member's Social Security Number.
- **3 - GRADE.** The member's current pay grade.
- **4 - PAY DATE.** The date the member entered active duty for pay purposes in YYMMDD format. This is synonymous with the Pay Entry Base Date (PEBD).
- **5 - YRS SVC.** In two digits, the actual years of creditable service.
- **6 - ETS.** The Expiration Term of Service in YYMMDD format. This is synonymous with the Expiration of Active Obligated Service (EAOS).
- **7 - BRANCH.** This field reflects branch of service OR program which the service member is enrolled.
- **8 - ADSN/DSSN.** The Disbursing Station Symbol Number used to identify each disbursing/finance office.
- **9 - PERIOD COVERED.** This field will show the "Check Date" for Reserve or National Guard members.

Fields 10 through 22 contain the entitlements, deductions, allotments, their respective totals, a mathematical summary portion and date initially entered military service.

- **10 - ENTITLEMENTS.** In columnar style the names of the entitlements and allowances being paid. Space is allocated for fifteen entitlements and/or allowances. If more than fifteen are present the overflow will be printed in the remarks block. Any retroactive entitlements and/or allowances will be added to like entitlements and/or allowances.
- **11 - DEDUCTIONS.** The description of the deductions is listed in columnar style. This includes items such as taxes, SGLI and dependent dental plan. Space is allocated for fifteen deductions. If more than fifteen are present the overflow will be printed in the remarks block. Any retroactive deductions will be added to like deductions.
- **12 - ALLOTMENTS.** Reservist and National Guard do not have allotments.
- **13 - AMT FWD.** The amount of all unpaid pay and allowances due from the prior LES.
- **14 - TOT ENT.** The figure from Field 20 that is the total of all entitlements and/or allowances listed.
- **15 - TOT DED.** The figure from Field 21 that is the total of all deductions.
- **16 - TOT ALMT.** Reservist and National Guard do not have allotments.
- **17 - NET AMT.** The dollar value of all unpaid pay and allowances, plus total entitlements and/or allowances, minus deductions due on the current LES.
- **18 - CR FWD.** The dollar value of all unpaid pay and allowances due to reflect on the next LES as the +AMT FWD.
- **19 - EOM PAY.** The actual amount of the payment to be paid to the member on that specific payday.

Fields 20 through 22 - TOTAL. The total amounts for the entitlements and/or allowances, and deductions respectively.

Fields 23 and 24 are NOT used by Reserve and National Guard members.

Fields 25 through 32 contain leave information.

- **25 - BF BAL.** The brought forward leave balance. Balance may be at the beginning of the fiscal year, or when active duty began, or the day after the member was paid Lump Sum Leave (LSL).
- **26 - ERND.** The cumulative amount of leave earned in the current fiscal year or current term of enlistment if the member reenlisted/extended since the beginning of the fiscal year. Normally increases by 2.5 days each month.
- **27 - USED.** The cumulative amount of leave used in the current fiscal year or current term of enlistment if member reenlisted/extended since the beginning of the fiscal year.
- **28 - CR BAL.** The current leave balance as of the end of the period covered by the LES.
- **29 - ETS BAL.** The projected leave balance to the member's Expiration Term of Service (ETS).
- **30 - LV LOST.** The number of days of leave that has been lost.
- **31 - LV PAID.** The number of days of leave paid to date.
- **32 - USE/LOSE.** The projected number of days of leave that will be lost if not taken in the current fiscal year on a monthly basis. The number of days of leave in this block will decrease with any leave usage.

Fields 33 through 38 contain Federal Tax withholding information.

- **33 - WAGE PERIOD.** The amount of money earned this LES period that is subject to Federal Income Tax Withholding (FITW).
- **34 - WAGE YTD.** The money earned year-to-date that is subject to FITW.
- **35 - M/S.** The marital status used to compute the FITW.
- **36 - EX.** The number of exemptions used to compute the FITW.

- **37 - ADD'L TAX.** The member specified additional dollar amount to be withheld in addition to the amount computed by the Marital Status and Exemptions.
- **38 - TAX YTD.** The cumulative total of FITW withheld throughout the calendar year.

Fields 39 through 43 contain Federal Insurance Contributions Act (FICA) information.

- **39 - WAGE PERIOD.** The amount of money earned this LES period that is subject to FICA.
- **40 - SOC WAGE YTD.** The wages earned year-to-date that are subject to FICA.
- **41 - SOC TAX YTD.** Cumulative total of FICA withheld throughout the calendar year.
- **42 - MED WAGE YTD.** The wages earned year-to-date that are subject to Medicare.
- **43 - MED TAX YTD.** Cumulative total of Medicare taxes paid year-to-date.

Fields 44 through 49 contain State Tax information.

- **44 - ST.** The two digit postal abbreviation for the state the member elected.
- **45 - WAGE PERIOD.** The amount of money earned this LES period that is subject to State Income Tax Withholding (SITW).
- **46 - WAGE YTD.** The money earned year-to-date that is subject to SITW.
- **47 - M/S.** The marital status used to compute the SITW.
- **48 - EX.** The number of exemptions used to compute the SITW.
- **49 - TAX YTD.** The cumulative total of SITW withheld throughout the calendar year.

Fields 50 through 62 contain additional Pay Data.

- **50 - BAQ TYPE.** The member's type of Basic Allowance for Quarters status.
 - W/O DEP - Member without dependents.
 - W DEP - Member with dependents.
 - WDAGQT - Member with dependents assigned government quarters.
- **51 - BAQ DEPN.** Indicates the type of dependent.
 - Spouse
 - Child
 - Parent
 - Grandfathered
 - Member married to member/own right
 - Ward of the court
 - Parents in Law
 - Own right
 - Student (age 21-22)
 - Handicapped child over age 21
 - Member married to member, child under 21
 - No dependents
 - N/A
- **52 - VHA ZIP.** The zip code used in the computation of Variable Housing Allowance (VHA) if entitlement exists.
- **53 - RENT AMT.** The amount of rent paid for housing if applicable.
- **54 - SHARE.** The number of people with which the member shares housing costs.
- **55 - STAT.** The VHA status; i.e., accompanied or unaccompanied.
- **56 - JFTR.** The Joint Federal Travel Regulation (JFTR) code based on the location of the member for Cost of Living Allowance (COLA) purposes.
- **57 - DEPNS.** The number of dependents the member has for COLA purposes.
- **58 - 2D JFTR.** The JFTR code based on the location of the member's dependents for COLA purposes.
- **59 - BAS TYPE**
 - STAND - Separate Rations
 - (blank) - Rations-in-kind not available
 - OFFIC - Officer Rations
- **60 - CHARITY YTD.** The cumulative amount of charitable contributions for the calendar year.
- **61 - TPC.** This field is not used by the Active Component.

Army Reserves and National Guard use this field to identify Training Program Codes.

 - A - Normal pay status code for a regular service member on regular duty.
 - C - Funeral Honors Duty.
 - M - Annual training tours over 30 days.
 - N - Death.
 - O - Training for HPSP, ROTC, and Special ADT over 30 days.
 - T - ADT over 29 days. (School)

- U - Undergraduate pilot training, in-grade pilot, navigator, and advance flying training officers.
 - X - Stipend Tour of HPIP participants or subsistence for ROTC participants.
 - Z - Administrative and support training (exclusive of recruiting).
- **62 - PACIDN.** The activity Unit Identification Code (UIC).

Fields 63 through 75 contain Thrift Savings Plan (TSP) information/data.

- **63 - BASE PAY RATE.** The percentage of base pay elected for TSP contributions.
- **64 - BASE PAY CURRENT.** The amount of Base Pay withheld for TSP from current pay entitlement
- **65 - SPECIAL PAY RATE.** The percentage of Specialty Pay elected for TSP contribution.
- **66 - SPECIAL PAY CURRENT.** The amount of Special Pay withheld for TSP from current pay entitlement.
- **67 - INCENTIVE PAY RATE.** Percentage of Incentive Pay elected towards TSP contribution.
- **68 - INCENTIVE PAY CURRENT.** The amount of Incentive Pay withheld for TSP from current pay entitlement.
- **69 - BONUS PAY RATE.** The percentage of Bonus Pay elected towards TSP contribution.
- **70 - BONUS PAY CURRENT.** The amount of Bonus Pay withheld for TSP from current pay entitlement.
- **71 - Reserved for future use.**
- **72 - TSP YTD DEDUCTION (TSP YEAR TO DATE DEDUCTION):** Dollar amount of TSP contributions deducted for the year.
- **73 - DEFERRED:** Dollar amount of pay elected to be deferred during the tax year.
- **74 - EXEMPT:** Dollar amount of TSP contributions that are reported as tax exempt to the Internal Revenue Service (IRS).
- **75 - Reserved for future use.**
- **76 - REMARKS.** Notices of starts, stops and changes to a member's pay items as well as general notices from varying levels of command may appear.
- **77 - YTD ENTITLE.** The cumulative total of all entitlements for the calendar year.
- **78 - YTD DEDUCT.** The cumulative total of all deductions for the calendar year.

APPENDIX F

RETIREE ACCOUNT STATEMENT					
STATEMENT EFFECTIVE DATE DEC 02, 2005	NEW PAY DUE AS OF JAN 03, 2006	SSN [REDACTED]			
PLEASE REMEMBER TO NOTIFY DFAS IF YOUR ADDRESS CHANGES [REDACTED]			DFAS-CL POINTS OF CONTACT DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIREMENT PAY PO BOX 7130 LONDON KY 40742-7130 COMMERCIAL (216) 522-5955 TOLL FREE 1-800-321-1080 TOLL FREE FAX 1-800-469-6559 myPay https://myPay.dfas.mil 1-877-363-3677		
PAY ITEM DESCRIPTION					
ITEM	OLD	NEW	ITEM	OLD	NEW
GROSS PAY	2,133.00	2,220.00			
VA WAIVER	108.00	112.00			
SBP COSTS	201.15	209.40			
TAXABLE INCOME	1,823.85	1,898.60			
			NET PAY	1,823.85	1,898.60
PAYMENT ADDRESS			YEAR TO DATE SUMMARY (FOR INFORMATION ONLY)		
DIRECT DEPOSIT			TAXABLE INCOME:		22,534.20
			FEDERAL INCOME TAX WITHHELD:		.00
TAXES					
FEDERAL WITHHOLDING STATUS:		MARRIED			
TOTAL EXEMPTIONS:		09			
SURVIVOR BENEFIT PLAN (SBP) COVERAGE					
SBP COVERAGE TYPE:	SPOUSE ONLY		ANNUITY BASE AMOUNT:	2,220.54	
SPOUSE ONLY COST:	144.34		55% ANNUITY AMOUNT:	1,185.51	
RCSBP COST:	65.06		40% ANNUITY AMOUNT:	862.19	
			SPOUSE DOB:	[REDACTED]	
<p>THE ANNUITY PAYABLE IS 55% OF YOUR ANNUITY BASE AMOUNT UNTIL YOUR SPOUSE REACHES AGE 62. AT AGE 62, THE ANNUITY MAY BE REDUCED DUE TO SOCIAL SECURITY OFFSET, OR UNDER THE TWO-TIER FORMULA. THAT REDUCTION MAY RESULT IN AN ANNUITY THAT RANGES BETWEEN 40% (\$ 862.19) AND 55% (\$1185.51) OF THE ANNUITY BASE AMOUNT. THE COMBINATION OF THE SBP ANNUITY AND THE SOCIAL SECURITY BENEFITS WILL PROVIDE TOTAL PAYMENTS FROM DFAS AND THE SOCIAL SECURITY ADMINISTRATION OF AT LEAST 55% OF YOUR BASE AMOUNT. THE ACTUAL ANNUITY PAYABLE IS DEPENDENT ON FACTORS IN EFFECT WHEN THE ANNUITY IS ESTABLISHED.</p>					

RETIRED SERVICEMAN FAMILY PROTECTION PLAN (RSFPP) COVERAGE

RSFPP COVERAGE TYPE ANNUITY PAYABLE RSFPP COST

ALLOTMENTS AND BONDS

ALLOTMENT TYPE PAYEE AMOUNT BOND FACE VALUE SERIES DEDUCTION

TAX LEVY DEDUCTIONS

DATE OF LEVY MONTHLY AMOUNT BALANCE

GARNISHMENT DEDUCTIONS

PAYEE GARNISHMENT AMOUNT COMPLETION DATE

FORMER SPOUSE PROTECTION ACT DEDUCTIONS

PAYEE AMOUNT

MISCELLANEOUS DEBTS

DEBT TYPE MONTHLY DEDUCTION PRINCIPAL AMOUNT INTEREST AMOUNT ACCUMULATED INTEREST DEBT BALANCE

ARREARS OF PAY BENEFICIARY INFORMATION

THE FOLLOWING BENEFICIARIES ARE ON RECORD:

NAME	SHARE	RELATIONSHIP
[REDACTED]	100.00	WIFE

MESSAGE SECTION

YOUR NEW PAY INCLUDES A 4.1% COST OF LIVING INCREASE.

YOUR RETIREE ACCOUNT STATEMENT AND ANY RETIRED PAY TAX FORMS (1099RS) FOR 2005 HAVE BEEN COMBINED INTO THIS ENVELOPE. PLEASE USE THESE TAX FORMS WHEN FILING YOUR 2005 TAX RETURN.

YOUR VA WAIVER WAS CHANGED DUE TO RECENT LEGISLATION.

DO YOU WANT TO VIEW YOUR ACCOUNT AND TAX STATEMENTS ON-LINE AND MAKE PAY ACCOUNT CHANGES?

VISIT MYPAY AT [HTTPS://MYPAY.DFAS.MIL](https://mypay.dfas.mil) TO EITHER OBTAIN OR CHANGE YOUR PERSONAL IDENTIFICATION NUMBER (PIN).

GET YOUR INCOME TAX REFUND IN HALF THE TIME BY USING IRS E-FILE WITH A DIRECT DEPOSIT

APPENDIX G

Concurrent Receipt of Military Retired Pay and Disability Payments

Effective: January 06, 2006

10 U.S.C. §1414.

Members eligible for retired pay who are also eligible for veterans' disability compensation for disabilities rated 50 percent or higher: concurrent payment of retired pay and veterans' disability compensation

(a) Payment of both retired pay and compensation.--

(1) In general.--Subject to subsection (b), a member or former member of the uniformed services who is entitled for any month to retired pay and who is also entitled for that month to veterans' disability compensation for a qualifying service-connected disability (hereinafter in this section referred to as a "qualified retiree") is entitled to be paid both for that month without regard to sections 5304 and 5305 of title 38. During the period beginning on January 1, 2004, and ending on December 31, 2013, payment of retired pay to such a qualified retiree is subject to subsection (c), except that in the case of a qualified retiree receiving veterans' disability compensation for a disability rated as 100 percent, payment of retired pay to such veteran is subject to subsection (c) only during the period beginning on January 1, 2004, and ending on December 31, 2004, and in the case of a qualified retiree receiving veterans' disability compensation at the rate payable for a 100 percent disability by reason of a determination of individual unemployability, payment of retired pay to such veteran is subject to subsection (c) only during the period beginning on January 1, 2004, and ending on September 30, 2009.

(2) Qualifying service-connected disability.--In this section, the term "qualifying service-connected disability" means a service-connected disability or combination of service-connected disabilities that is rated as not less than 50 percent disabling by the Secretary of Veterans Affairs.

(b) Special rules for chapter 61 disability retirees.

(1) Career retirees.--The retired pay of a member retired under chapter 61 of this title with 20 years or more of service otherwise creditable under section 1405 of this title, or at least 20 years of service computed under section 12732 of this title, at the time of the member's retirement is subject to reduction under sections 5304 and 5305 of title 38, but only to the extent that the amount of the member's retired pay under chapter 61 of this title exceeds the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

(2) Disability retirees with less than 20 years of service.--Subsection (a) does not apply to a member retired under chapter 61 of this title with less than 20 years of service otherwise creditable under section 1405 of this title, or with less than 20 years of service computed under section 12732 of this title, at the time of the member's retirement.

(c) Phase-in of full concurrent receipt.--During the period beginning on January 1, 2004, and ending on December 31, 2013, retired pay payable to a qualified retiree that pursuant to the second sentence of subsection (a)(1) is subject to this subsection shall be determined as follows:

(1) Calendar year 2004.--For a month during 2004, the amount of retired pay payable to a qualified retiree is the amount (if any) of retired pay in excess of the current baseline offset plus the following:

(A) For a month for which the retiree receives veterans' disability compensation for a disability rated as total, \$750.

(B) For a month for which the retiree receives veterans' disability compensation for a disability rated as 90 percent, \$500.

(C) For a month for which the retiree receives veterans' disability compensation for a disability rated as 80 percent, \$350.

(D) For a month for which the retiree receives veterans' disability compensation for a disability rated as 70 percent, \$250.

(E) For a month for which the retiree receives veterans' disability compensation for a disability rated as 60 percent, \$125.

(F) For a month for which the retiree receives veterans' disability compensation for a disability rated as 50 percent, \$100.

(2) Calendar year 2005.--For a month during 2005, the amount of retired pay payable to a qualified retiree is the sum of--

(A) the amount specified in paragraph (1) for that qualified retiree; and

(B) 10 percent of the difference between (i) the current baseline offset, and (ii) the amount specified in paragraph (1) for that member's disability.

(3) Calendar year 2006.--For a month during 2006, the amount of retired pay payable to a qualified retiree is the sum of--

(A) the amount determined under paragraph (2) for that qualified retiree; and

(B) 20 percent of the difference between (i) the current baseline offset, and (ii) the amount determined under paragraph (2) for that qualified retiree.

(4) Calendar year 2007.--For a month during 2007, the amount of retired pay payable to a qualified retiree is the sum of--

(A) the amount determined under paragraph (3) for that qualified retiree; and

(B) 30 percent of the difference between (i) the current baseline offset, and (ii) the amount determined under paragraph (3) for that qualified retiree.

(5) Calendar year 2008.--For a month during 2008, the amount of retired pay payable to a qualified retiree is the sum of--

(A) the amount determined under paragraph (4) for that qualified retiree; and

(B) 40 percent of the difference between (i) the current baseline offset, and (ii) the amount determined under paragraph (4) for that qualified retiree.

(6) Calendar year 2009.--For a month during 2009, the amount of retired pay payable to a qualified retiree is the sum of--

(A) the amount determined under paragraph (5) for that qualified retiree; and

(B) 50 percent of the difference between (i) the current baseline offset, and (ii) the amount determined under paragraph (5) for that qualified retiree.

(7) Calendar year 2010.--For a month during 2010, the amount of retired pay payable to a qualified retiree is the sum of--

(A) the amount determined under paragraph (6) for that qualified retiree; and

(B) 60 percent of the difference between (i) the current baseline offset, and (ii) the amount determined under paragraph (6) for that qualified retiree.

(8) Calendar year 2011.--For a month during 2011, the amount of retired pay payable to a qualified retiree is the sum of--

(A) the amount determined under paragraph (7) for that qualified retiree; and

(B) 70 percent of the difference between (i) the current baseline offset, and (ii) the amount determined under paragraph (7) for that qualified retiree.

(9) Calendar year 2012.--For a month during 2012, the amount of retired pay payable to a qualified retiree is the sum of--

(A) the amount determined under paragraph (8) for that qualified retiree; and

(B) 80 percent of the difference between (i) the current baseline offset, and (ii) the amount determined under paragraph (8) for that qualified retiree.

(10) Calendar year 2013.--For a month during 2013, the amount of retired pay payable to a qualified retiree is the sum of--

(A) the amount determined under paragraph (9) for that qualified retiree; and

(B) 90 percent of the difference between (i) the current baseline offset, and (ii) the amount determined under paragraph (9) for that qualified retiree.

(11) General limitation.--Retired pay determined under this subsection for a qualified retiree, if greater than the amount of retired pay otherwise applicable to that qualified retiree, shall be reduced to the amount of retired pay otherwise applicable to that qualified retiree.

(d) Coordination with combat-related special compensation program.--

(1) In general.--A person who is a qualified retiree under this section and is also an eligible combat-related disabled uniformed services retiree under section 1413a of this title may receive special compensation in accordance with that section or retired pay in accordance with this section, but not both.

(2) Annual open season.--The Secretary concerned shall provide for an annual period (referred to as an "open season") during which a person described in paragraph (1) shall have the right to make an election to change from receipt of special compensation in accordance with section 1413a of this title to receipt of retired pay in accordance with this section, or the reverse, as the case may be. Any such election shall be made under regulations prescribed by the Secretary concerned. Such regulations shall provide for the form and manner for making such an election and shall provide for the date as of when such an election shall become effective. In the case of the Secretary of a military department, such regulations shall be subject to approval by the Secretary of Defense.

(e) Definitions.--In this section:

(1) Retired pay.--The term "retired pay" includes retainer pay, emergency officers' retirement pay, and naval pension.

(2) Veterans' disability compensation.--The term "veterans' disability compensation" has the meaning given the term "compensation" in section 101(13) of title 38.

(3) Disability rated as total.--The term "disability rated as total" means--

(A) a disability, or combination of disabilities, that is rated as total under the standard schedule of rating disabilities in use by the Department of Veterans Affairs; or

(B) a disability, or combination of disabilities, for which the scheduled rating is less than total but for which a rating of total is assigned by reason of inability of the disabled person concerned to secure or follow a substantially gainful occupation as a result of disabilities for which veterans' disability compensation may be paid.

(4) Current baseline offset.--

(A) **In general.--**The term "current baseline offset" for any qualified retiree means the amount for any month that is the lesser of--

(i) the amount of the applicable monthly retired pay of the qualified retiree for that month; and

(ii) the amount of monthly veterans' disability compensation to which the qualified retiree is entitled for that month.

(B) **Applicable retired pay.--**In subparagraph (A), the term "applicable retired pay" for a qualified retiree means the amount of monthly retired pay to which the qualified retiree is entitled, determined without regard to this section or sections 5304 and 5305 of title 38, except that in the case of such a retiree who was retired under chapter 61 of this title, such amount is the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

APPENDIX H

Combat Related Special Compensation

Effective: January 01, 2004

10 U.S.C. 1413a.

Combat-related special compensation

(a) Authority.--The Secretary concerned shall pay to each eligible combat-related disabled uniformed services retiree who elects benefits under this section a monthly amount for the combat-related disability of the retiree determined under subsection (b).

(b) Amount.--

(1) Determination of monthly amount.--Subject to paragraphs (2) and (3), the monthly amount to be paid an eligible combat-related disabled uniformed services retiree under subsection (a) for any month is the amount of compensation to which the retiree is entitled under title 38 for that month, determined without regard to any disability of the retiree that is not a combat-related disability.

(2) Maximum amount.--The amount paid to an eligible combat-related disabled uniformed services retiree for any month under paragraph (1) may not exceed the amount of the reduction in retired pay that is applicable to the retiree for that month under sections 5304 and 5305 of title 38.

(3) Special rules for chapter 61 disability retirees.--In the case of an eligible combat-related disabled uniformed services retiree who is retired under chapter 61 of this title, the amount of the payment under paragraph (1) for any month shall be reduced by the amount (if any) by which the amount of the member's retired pay under chapter 61 of this title exceeds the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

(c) Eligible retirees.--For purposes of this section, an eligible combat-related disabled uniformed services retiree referred to in subsection (a) is a member of the uniformed services entitled to retired pay who--

(1) has completed at least 20 years of service in the uniformed services that are creditable for purposes of computing the amount of retired pay to which the member is entitled or is entitled to retired pay under section 12731 of this title (other than by reason of section 12731b of this title); and

(2) has a combat-related disability.

(d) Procedures.--The Secretary of Defense shall prescribe procedures and criteria under which a disabled uniformed services retiree may apply to the Secretary of a military department to be considered to be an eligible combat-related disabled uniformed services retiree. Such procedures shall apply uniformly throughout the Department of Defense.

(e) Combat-related disability.--In this section, the term "combat-related disability" means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that--

(1) is attributable to an injury for which the member was awarded the Purple Heart; or

(2) was incurred (as determined under criteria prescribed by the Secretary of Defense)--

(A) as a direct result of armed conflict;

(B) while engaged in hazardous service;

(C) in the performance of duty under conditions simulating war; or

(D) through an instrumentality of war.

(f) Coordination with concurrent receipt provision.--Subsection (d) of section 1414 of this title provides for coordination between benefits under that section and under this section.

(g) Status of payments.--Payments under this section are not retired pay.

(h) Source of payments.--Payments under this section for a member of the Army, Navy, Air Force, or Marine Corps shall be paid from the Department of Defense Military Retirement Fund. Payments under this section for any other member for any fiscal year shall be paid out of funds appropriated for pay and allowances payable by the Secretary concerned for that fiscal year.

(i) Other definitions.--In this section:

(1) The term "service-connected" has the meaning given such term in section 101 of title 38.

(2) The term "retired pay" includes retainer pay, emergency officers' retirement pay, and naval pension.

APPENDIX I

927 S.W.2d 118
(Cite as: 927 S.W.2d 118)

Court of Appeals of Texas,
Houston (1st Dist.).

David A. BLOOMER, Appellant,
v.
Patricia Anne BLOOMER, Appellee.

No. 01-91-01428-CV.

June 13, 1996.
Rehearing Overruled July 11, 1996.
Writ Ref'd n.r.e.

In divorce action, the 328th District Court, Fort Bend County, Thomas O. Stansbury, J., entered final decree. Former husband appealed. The Court of Appeals, Wilson, J., held that: (1) percentage of husband's military retirement benefits that was subject to division as community property would be calculated by dividing retirement points accrued while married by total retirement points accrued, and (2) in dividing husband's civil service retirement benefits, trial court could not characterize any monetary value of future annuity based on creditable premarriage military service as community property.

Reversed and remanded.

West Headnotes

[1] **Husband and Wife 249(3)**
205k249(3)

Former wife was entitled to just-and-right division of community estate's interest at time of divorce in former husband's contingent right to military retirement benefits. V.T.C.A., Family Code § 3.63(a).

[2] **Divorce 253(3)**
134k253(3)

Percentage of former husband's military retirement benefits that was subject to division as community property would be calculated by dividing retirement points accrued while married by total retirement points accrued. V.T.C.A., Family Code § 3.63(a).

[3] **Divorce 252.3(3)**
134k252.3(3)

Trial court did not have power to divest former husband of portion of his separate property.

[4] **Divorce 184(4)**
134k184(4)

In absence of findings of fact and conclusions of law, Court of Appeals must presume that trial court made all necessary findings to support divorce decree.

[5] **Husband and Wife 249(3)**
205k249(3)

In dividing former husband's civil service retirement benefits, trial court could not characterize any monetary value of future annuity based on creditable pre-marriage military service as community property. V.T.C.A., Family Code § 5.01(a)(1).

[6] **Husband and Wife 249(3)**
205k249(3)

Pension benefits accruing as compensation for services rendered after divorce are not part of parties' community estate subject to just-and-right division. *119 James N. Higdon, San Antonio, Martin D. Carden, Richmond, for appellant.

Ronald R. Pope, Richmond, for appellee.

Before SCHNEIDER, C.J., and O'CONNOR and WILSON, JJ.

OPINION ON REHEARING

WILSON, Justice.

The issue in this case is the proper method of characterization of reserve duty military and civil service retirement benefits. This is an appeal from the rendition of a final divorce decree after a bench trial. Appellant David A. Bloomer challenges in two points of error the characterization and award of part of his Air Force and civil service retirement benefits to appellee Patricia Anne Bloomer, his former wife. [FN1] We reverse.

FN1. On February 27, 1996, we granted David's motion for rehearing, withdrew our judgment and opinion of October 26, 1995, and ordered the case to be resubmitted. See Tex.R.App.P. 100(c). After receiving leave of Court, David filed an amended brief

bringing seven points of error. We will consider the additional authorities in David's amended brief, but we will not consider his additional points of error.

Military Retirement Benefits

The Bloomers were married a total of 160 months from March 18, 1978 to June 19, 1991, the date the trial court rendered a decree granting their divorce. At trial, David testified without objection that he earned 2479 points for his Air Force reserve service before his marriage and 906 points during his marriage, for a total of 3385 points.[FN2] The trial court, however, characterized *120 and awarded the military retirement benefits to Patricia as follows:

FN2. The requirements for entitlement to military retirement pay are set forth in 10 U.S.C.S. § 12731(a) (Law. Co-op Supp.1996) and include the performance of at least 20 years of military service. A year of military service accrues for each one-year period in which the person is credited with at least 50 military retirement points. 10 U.S.C.S. § 12732(a)(2) (Law. Co-op Supp.1996). The method by which points are earned is set forth in 10 U.S.C.S. § 12732(a)(2) (Law. Co-op Supp.1996). We note that the United States Code provisions related to military retirement benefits cited in this opinion were transferred from chapter 67 to chapter 1223 of title 10 on October 5, 1994. National Defense Authorization Act for Fiscal Year 1995, Pub.L. No. 103-337, § 1662(j)(1), 106 Stat. 2663, 2998. Because there is no substantive difference as the law relates to this case, we cite to the current provisions in chapter 1223.

All right, title, and interest in and to 34% (1/2 x 160/236) of the United States Air Force disposal retired [sic] or retainer pay to be paid as a result of DAVID A. BLOOMER's service in the United States Air Force, and 34% of all increases in the United States Air Force disposable retirement or retainer pay due to cost of living or other reasons, if, as, and when received.

The characterization and award was based on David's months of military service, rather than the points he accrued during marriage. The court explained the award by stating, "They had been

married 160 months through July, 1991. That will have been 160 months if I calculated that correctly.... As I understood the testimony, he will have 20 years [of reserve service] in November. I simply backed off four months from that 240 months to get 236."

In David's first point of error, he contends the trial court erred in rendering its divorce decree because the court awarded a portion of his separate property, the military retirement benefits, to Patricia. See Tex.Fam.Code Ann. § 5.01(a)(1) (Vernon 1993) (spouse's separate property consists of property owned by spouse before marriage). David argues that the 2479 points he accrued before his marriage are his separate property and the 906 points he accrued during his marriage are community property. We agree.

[1] Patricia is entitled to a just-and-right division of the community estate's interest at the time of divorce in David's contingent right to military retirement benefits. Taggart v. Taggart, 552 S.W.2d 422, 423 (Tex.1977); see Tex.Fam.Code Ann. § 3.63(a) (Vernon 1993); Berry v. Berry, 647 S.W.2d 945, 947 (Tex.1983). The trial court apparently attempted to follow Taggart literally in characterizing the community estate's share of David's military retirement benefits. In Taggart, the former husband had 360 months of active and retired naval service, with 246 months of those months earned during marriage. The supreme court held the former wife was entitled to a division of the percentage of the former husband's retirement benefits that belonged to the community estate, i.e., 246/360. Taggart, 552 S.W.2d at 424.

A literal application of the characterization of property under the facts in Taggart would be inappropriate in this case. A California appellate court has observed that military retirement benefits for active duty personnel are in effect based on the number of months served, as long as the retiree has the minimum number of years of service, i.e., 20 years. In re Marriage of Poppe, 97 Cal.App.3d 1, 158 Cal.Rptr. 500, 501 (Ct.App.1979); see 10 U.S.C.S. §§ 12731(a), 12732(a)(2) (Law. Co-op Supp.1996). Military retirement benefits for reserve personnel, however, are based on the total number of points the retiree accumulated during reserve duty, as long as the retiree accumulated at least 20 years in which at least 50 or more points were earned. Poppe, 158 Cal.Rptr. at 501; see 10 U.S.C.S. §§ 12731(a), 12732(a)(2) (Law. Co-op Supp.1996).[FN3] Depending on how active a reservist is, the reservist could accumulate more

points before marriage than are accumulated during marriage, even though the reservist has spent more calendar time as a married reservist than as an unmarried one.

FN3. The statutory requirements for active duty and reserve personnel are actually the same. It is unnecessary to consider an active duty retiree's points, however, because there is a direct ratio between length of active duty service and accumulated points: points for active duty personnel accrue at the constant rate of one point per day. 10 U.S.C.S. § 12732(a)(2)(A)(i) (Law. Co-op Supp.1996).

In Poppe, the court was faced with facts similar to this case. The Poppe court concluded that the California trial court's apportionment was erroneous because the basis of the apportionment, the ratio of the months of *121 reserve duty service during marriage compared to the total months of reserve duty service, bore no substantial rational relationship to the amount of the pension. Poppe, 158 Cal.Rptr. at 503. We adopt the rationale of Poppe and apply it to this case.

[2][3][4] The trial court should have characterized David's military retirement benefits by comparing his points accrued while married to the total accrued points, i.e., 906/3385, or 26.77 percent. It was this 26.77 percent of David's military retirement benefits that was subject to a just-and-right division. The remaining 73.23 percent was his separate property and was not subject to division.[FN4] The trial court's decree divested David of a portion of his separate property, which the court did not have the power to do. [FN5] See Cameron v. Cameron, 641 S.W.2d 210, 215 (Tex.1982); Powell v. Powell, 822 S.W.2d 181, 184 (Tex.App.--Houston [1st Dist.] 1991, writ denied). Accordingly, we sustain David's first point of error.

FN4. Assuming the just-and-right division was 50-50, the trial court should have awarded Patricia 13.38 percent ($1/2 \times 906/3385$) of David's military retirement benefits and associated cost of living increases.

FN5. Patricia claims that the absence of findings of fact and conclusions of law

requires us to overrule point of error one. While it is true that in the absence of findings of fact and conclusions of law we must presume that the trial court made all necessary findings to support its decree, there is no disagreement regarding the crucial facts, i.e., the dates of the marriage and divorce and the number of military retirement points accrued both before and during the marriage. See Worford v. Stamper, 801 S.W.2d 108, 109 (Tex.1990). This appeal, however, is not about the facts. We agree with David that the trial court used an incorrect legal standard to characterize the military retirement benefits, and accordingly there is no legal theory supported by the evidence on which we may affirm the decree. See id.

Civilian Retirement Benefits

David testified without objection at trial that he had worked for the Department of Veterans Affairs and its predecessor, the Veterans Administration, from December 1978 to the present, which amounts to a total of 151 months from December 1978 to the rendition of the divorce decree. David also testified that he was married to Patricia during the entire time he was employed by the VA and that the present value of his civil service retirement was \$34,454.25.

The trial court characterized and awarded a portion of David's civil service retirement to Patricia as follows:

All right, title, and interest in and to the monthly amount determined under the formula set forth below from the gross annuity to be paid by the Civil Service Retirement System (or the Federal Employees Retirement System in the event DAVID A. BLOOMER transfers from the Civil Service Retirement System to the Federal Employees Retirement System Basic Plan) as a result of DAVID A. BLOOMER's employment in the civil service of the United States of America (and any service in the Armed Forces of the United States of America and all employment which is creditable indetermining retirement benefits), if, as, and when payable, and a proportional share of all costs of living increases therein, in the proportional share that the award to PATRICIA ANNE BLOOMER on a monthly basis bears to the total monthly annuity payment paid, all of said payments to be paid as set forth below. In the event a lump sum credit is paid from the Civil Service Retirement System Basic Plan (or the

Federal Employees Retirement System in the event DAVID A. BLOOMER transfers from the Civil Service Retirement System to the Federal Employees Retirement System Basic Plan) PATRICIA ANNE BLOOMER is awarded and shall receive an amount determined under the formula set forth below from such lump sum payment to be paid as set forth below.

The Formula to determine the monthly amount to be paid to PATRICIA ANNE BLOOMER is:

1. 151 months divided by the total number of months credited toward DAVID A. BLOOMER's retirement in the Civil Service Retirement System (or Federal Employees Retirement System) times 1/2 times the amount of the gross annuity (or the amount of the lump sum credit if that is what is paid).

*122 In David's second point of error, he contends the trial court erred in rendering its divorce decree because the court awarded a portion of his separate property, the civilian retirements benefits, to Patricia. See Tex.Fam.Code Ann. § 5.01(a)(1) (Vernon 1993). David does not dispute the ratio in the trial court's formula, i.e., the months of civil service credited during marriage compared to the total number of months of civil service credited. What David disputes is the trial court's failure to limit the future annuity to which the ratio will apply to that portion of the annuity which was earned during the marriage.

[5] David argues that the trial court cannot characterize any monetary value of the future annuity which is based on creditable pre-marriage military service as community property. We agree. If the trial court, however, includes the number of months of David's creditable pre-marriage military service as a part of the "the total number of months credited toward DAVID A. BLOOMER's retirement in the Civil Service Retirement System," then the Taggart ratio of number of months while married compared to the total number of months credited towards retirement will properly account for David's separate property.

[6] David also argues that the trial court failed to limit the calculation of the future annuity to an annuity based on his salary and months of service at the time of divorce. We agree. Pension benefits accruing as compensation for services rendered after a divorce are not part of the parties' community estate subject to a just-and-right division. Grier v. Grier, 731 S.W.2d 931, 932 (Tex.1987); Berry, 647 S.W.2d at 947. Accordingly, we sustain David's second point of

error.[FN6]

FN6. As in point of error one, Patricia claims that the absence of findings of fact and conclusions of law requires us to overrule point of error two. We reject her argument for the reasons given above.

We reverse the divorce decree and remand the cause to the trial court for further proceedings.

END OF DOCUMENT

APPENDIX J

In re the Marriage of JOSEPHINE A. and DANIEL
G. POPPE. DANIEL G. POPPE, Appellant,
v.
JOSEPHINE A. POPPE, Respondent.
Civ. No. 20642.

Court of Appeal, Fourth District, Division 2,
California.
Sept. 17, 1979.

SUMMARY

The trial court denied the request of a former husband that spousal support for his wife be decreased or terminated, and it granted the application of the former wife for modification of the prior marriage dissolution judgment by fixing her interest in the husband's Naval Reserve pension, which he had subsequently begun to receive, on the basis of the time rule at one-half the fraction represented by the ratio between the number of years of reserve service during the marriage before separation and the number of qualifying years of service. The record indicated the husband had served about nine years on active duty prior to marriage. The marriage lasted for 27 years during which he was in the Naval Reserve. He served about four more years in the reserve after separation from his wife. The amount of pension paid to Naval Reserve retirees is a function of the number of points earned while a reservist. Essentially one point is earned for each drill attended. To be eligible for retirement, a Naval reservist must have been credited with a minimum number of qualifying years of service, that is, years in which 50 or more points were earned. However, if the minimum qualifying years requirement is met, all points earned are counted in the calculation of pension notwithstanding that in some years less than 50 points were earned. For periods of active duty, one point is credited for each day. The husband earned only one-third of his total points during the marriage, but the community interest in the pension, as calculated by the trial court under the time rule, amounted to almost nine-tenths of the entire pension. (Superior Court of Orange County, No. D-71774, James K. Turner, Judge.)

The Court of Appeal reversed the order insofar as it established the former wife's interest in the Naval Reserve pension, with directions to the trial court to redetermine the pension, and the court affirmed the order in all other respects. The court held that apportionment of retirement benefits on the basis of the time rule was appropriate only where the amount

of the retirement benefits was substantially related to the number of years of service. Thus, the court held that since the amount of the former husband's pension was not substantially related to the number of years he served in the Naval Reserve, the trial court abused its discretion in using the time rule to calculate the community interest in the retirement benefits. The court also held that in light of the facts that the former wife's monthly expenses were in excess of her net earnings, and that the former husband's net monthly income was in excess of his expenses, the trial court properly declined to decrease or terminate spousal support for the former wife. (Opinion by Kaufman, J., with Tamura, Acting P. J., and McDaniel, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Dissolution of Marriage; Separation § 60-- Property Rights of Parties-- Division of Community and Quasi-community Property--Revision and Modification of Division--Reservation of Jurisdiction.

The trial court had jurisdiction to apportion the community interest in a husband's retirement benefits for which he became eligible several years after the court's interlocutory judgment dissolving the marriage. The record in the dissolution proceeding indicated that the court had not at that time determined the value of the community interest in the pension funds but had reserved jurisdiction to make such an order when the former husband began to receive his pension payments.

(2) Dissolution of Marriage; Separation § 52-- Property Rights of Parties-- Division of Community and Quasi-community Property--Federal Retirement Benefits--Apportionment--Federal law as Preempting State law.

The federal statute basing Naval Reserve pensions on a point system is not preemptive of any state law that would apportion it upon dissolution of marriage on another basis or on the basis of the time rule which establishes that the nonemployee-spouse's interest in the retirement benefits equals one-half the ratio of the number of years of service during marriage *3 but before separation to the total length of service by the employee-spouse.

(3) Dissolution of Marriage; Separation § 52-- Property Rights of Parties-- Division of Community and Quasi-community Property--Valuation--Federal Retirement Benefits--Apportionment--Time Rule.

The trial court abused its discretion in ordering, subsequent to an interlocutory judgment dissolving the parties' marriage, that the former wife's interest in the husband's Naval Reserve pension be calculated on the basis of the time rule at one-half the ratio of the number of years of reserve service during the marriage before separation to the number of the former husband's qualifying years of service. The record indicated that the number of years of service during the marriage before separation compared to the qualifying years in service did not bear a substantial relationship to the amount of the pension for which the husband was eligible. Retirement benefits paid to Naval Reserve retirees are based on a point system and the husband earned only one-third of his points during the marriage. However, under the trial court's application of the time rule, the community interest in the pension was equal to almost nine-tenths of the pension.

[Cal.Jur.3d, Family Law, § 419; Am.Jur.2d, Divorce and Separation, § 929.]

(4a, 4b) Dissolution of Marriage; Separation § 69-- Property Rights of Parties--Support of Other Party--Modification, Revocation and Extension--Change of Conditions.

The trial court did not abuse its discretion in denying a former husband's request to reduce or terminate the \$100 per month spousal support which he was presently paying, despite the fact that the wife's expenses had been somewhat reduced by her daughter's marriage and departure from the residence they shared. The record indicated the wife's monthly expenses exceeded her earnings by about \$100, while the husband's net monthly income exceeded his expenses by about \$200. Furthermore, the marriage had lasted in excess of 27 years.

(5) Dissolution of Marriage; Separation § 69-- Property Rights of Parties-- Support of Other Party--Modification--Change of Conditions.

A modification of spousal support cannot be granted in the absence of proof of a change in circumstances. However the converse is not true. A showing of changed circumstances does not necessarily mandate a modification of spousal support. *4

(6) Dissolution of Marriage; Separation § 52-- Property Rights of Parties-- Division of Community and Quasi-community Property--Valuation--Retirement Benefits--Judicial Discretion.

The apportionment of retirement benefits between the separate and community property estates must be

reasonable and fairly representative of the relative contributions of the community and separate estates. The basis for apportionment, however, is a matter committed to the judicial discretion of the trial court, not a reviewing court.

COUNSEL

James F. Rees for Appellant.

James F. Leck for Respondent.

KAUFMAN, J.

The marriage of the parties was dissolved by a final judgment on January 30, 1974, referring to and incorporating the provisions of an interlocutory judgment entered on November 9, 1973. Daniel G. Poppe (hereafter former husband) appeals from an order of the court dated September 18, 1978, denying his request that spousal support be decreased or terminated and granting the application of Josephine A. Poppe (former wife) for "modification" of the judgment by fixing her interest in the Naval Reserve pension being received by former husband on the basis of the "time rule" at one-half the fraction 27.2531.50, the numerator being the number of years of reserve service during the marriage before separation and the denominator being the number of former husband's "qualifying" years of service, which amounts to \$253.60 of the total of \$592 per month presently being received.

Naval Reserve Pension

Former husband entered the Navy on July 1, 1937. He served on active duty from that date until July 13, 1946, at which time he became a member of the Naval Reserve. On February 23, 1946, the parties were married. The parties separated on June 16, 1973, and their marriage was *5 subsequently dissolved as previously indicated. After the separation of the parties former husband continued serving in the Naval Reserve until he retired on October 31, 1977. He commenced receiving pension payments on November 30, 1977.

Retirement benefits paid to Navy personnel retiring from active duty are based on the number of years served and the amount of the retiree's salary during active service. Contrastingly, the amount of the pension paid to Naval Reserve retirees is a percentage of the base pay for the rank achieved arrived at on the basis of the number of points accumulated by the retiree during his service in the Naval Reserve. Essentially one point is earned for each drill attended. For example, 14 or 15 points

would be earned during the annual two weeks' training duty. For periods of active duty, one point is credited for each day. To be eligible for retirement a Naval reservist must have been credited with a minimum number of "qualifying" years of service, that is, years in which 50 or more points were earned. However, if the minimum "qualifying" years requirement is met, all points earned are counted in the calculation of the pension notwithstanding that in some years less than 50 points were earned.

Former husband retired with a total of 5,002 points of which more than 3,000 were earned during the period he was on active duty prior to the marriage. The number of points accumulated during the marriage was 1,632. The balance of former husband's points were earned by him for his participation in the Naval Reserve after the separation of the parties. It was former husband's contention in the trial court that former wife's interest in the pension should be computed by multiplying one-half times the fraction $\frac{1632}{5002}$ times the amount of the pension, \$592 per month. Apportioning the pension in that fashion, former wife's share would amount to approximately \$95.50 per month, and former husband had been paying that sum to former wife. However, the trial court determined that former husband's "qualifying" years totaled 31.50 and apportioned the pension on the basis of the "time rule" by dividing the 27.25 years between marriage and separation by the 31.5 "qualifying" years so that former wife's share amounts to \$253.60 per month.^{FN1}

FN1 Former husband contends that even if the trial court's apportionment were otherwise correct, the denominator should have been the full 36 or 37 years he was in the service. Since we conclude the basis for apportionment employed by the court was inappropriate, we do not reach this question.

(1) Former husband first contends that the Naval Reserve pension was divided by the court in the interlocutory judgment of dissolution in *6 accordance with his point ratio theory, that that determination has long since become final and that the trial court lacked jurisdiction to alter the division long since and finally made. Not so.

In numbered paragraph 4 of the interlocutory judgment the court purported to divide the community property. It dealt with items "a" through "e," none of which was the Naval Reserve retirement benefits. Numbered paragraph 5 read: "The Court Further Orders that respondent [former wife] has a

right to apply for and obtain one half of petitioner's [former husband's] military pension benefits accrued between February 23, 1946 and June 16, 1973 when petitioner [former husband] is eligible to obtain said benefits."

Former husband contends that the court's intention to divide the retirement benefits in accordance with former husband's ratio theory is evident from a dialogue between the court and former husband near the conclusion of the dissolution hearing in which the court stated to former husband: "What you accumulated by points toward your pension prior to the time of marriage is a hundred percent your separate property." We cannot agree.

During the same dialogue the court stated, apparently to former wife: "Once he [former husband] applies and once he gets it [the pension], then you're going to get an appropriate amount *based on the number of years to the date of separation that you were married to him*. You are entitled to one-half as a community vested property interest as of that time." (Italics added.) We think it rather clear from the entire statement of the court^{FN2} *7 taken together with the format and language of the interlocutory judgment that what the court did and intended to do was to adjudicate that the community property interest in the retirement benefits was that accruing between February 23, 1946, and June 16, 1973, that former wife was entitled to one-half of such community property interest if and when former husband should become eligible for and apply for the pension and that jurisdiction was reserved to permit the court to make an order for an "appropriate amount" out of the pension to be paid to former wife if and when pension payments should materialize. Our conclusion in this regard is confirmed by the fact that, so far as appears, no evidence was introduced at the dissolution trial as to how Naval Reserve retirement benefits were calculated and no mention of the point system was made at the hearing other than former husband's query to the court near the conclusion of the hearing (see fn. 2, *ante*). Further, had the court intended finally to divide the retirement benefits at the time of the dissolution its use of the language that former wife "has a right to apply for and obtain" her portion of the benefits would be rendered most inappropriate.

FN2 The dialogue in its entirety reads: "Now on this Naval time the Court has to order that at such time as you reach 60 or at such time as you apply-Mrs. Poppe, if this man never applies for Naval retirement, you

never get it. I can't be more clear. You never get it if he never applies. All right. Because that's within his power and control. All right. Once he applies and once he gets it, then you're going to get an appropriate amount based on the number of years to the date of separation that you were married to him. You are entitled to one-half as a community vested property interest as of that time.

"Now Mr. Poppe, you continue on with Naval service. Everything hereafter you get full credit; it's all yours. So, he'll be getting more than you get, but the Court will order that you pay that proportionate [share] at such time as you apply. And when you receive it and upon receipt, then that proportionate share you're going to have to pay over to your wife, this wife, Mrs. Poppe.

"Mr. Poppe: I have a question. In figuring out the pension, it's based on points that you accumulate for the 25 year period.

"The Court: That's right.

"Mr. Poppe: And so would this start when the marriage started and stop when the marriage separated?

"The Court: It starts-

"Mr. Poppe: Anything before that, would that count?

"The Court: Were you in the service before you married?

"Mr. Poppe: Yes, sir.

"The Court: And you have credit for that?

"Mr. Poppe: Yes, sir.

"The Court: Then that's all yours. That's the reason you have to figure it out. That's another item counsel is going to have to figure out. When you prepare the decree, you figure it out. What you accumulated by points toward your pension prior to the time of marriage is a hundred percent your separate property. It's only from the date of marriage that the wife has one-half interest in that. And then from the time of separation, not divorce but separation, then that ends. All right. Is there any item now of property that the Court has not disposed of?"

Thus, wife's application for a "modification" of the judgment of dissolution was in reality a request to the court to exercise its reserved jurisdiction to make an order specifying the proportion and amount of her interest in the Naval Reserve pension. The court having reserved jurisdiction by its order that former wife would have in the future the "right to apply for and obtain" her share of the pension, the court was not precluded from entertaining former wife's application and making an order quantifying her interest.

Next former husband contends that the trial court's

apportionment of the pension was legally erroneous. (2)Alternatively he argues that the federal statute basing Naval Reserve pensions on a point system is preemptive of any state law that would apportion it upon dissolution of marriage on another basis or that apportionment on the basis of the "time rule" was arbitrary and unreasonable and constituted an abuse of judicial discretion. Former husband cites no relevant authority in support of his *8 federal preemption argument, and we reject it. (Cf. *Gorman v. Gorman*, 90 Cal.App.3d 454, 460-462 [153 Cal.Rptr. 479].) (3)However, we agree that the apportionment made by the trial court was erroneous because the basis upon which the apportionment was made, years of service during the marriage before separation compared to "qualifying" years in service, bears no substantial rational relationship to the amount of the pension.

Former wife asserts that the "time rule" is the normal basis for apportioning retirement benefits earned in part during coverture and was appropriately employed by the court in the case at bench. Although the "time rule" is not the only acceptable method for apportioning retirement benefits between the community and separate estates (see *In re Marriage of Adams*, 64 Cal.App.3d 181, 186, fn. 6, 187, fn. 8 [134 Cal.Rptr. 298]), it is apparently the method most frequently employed. (See, e.g., *In re Marriage of Judd*, 68 Cal.App.3d 515, 522 [137 Cal.Rptr. 318]; *In re Marriage of Adams, supra.*, 64 Cal.App.3d at pp. 181, 184 et seq; *In re Marriage of Anderson*, 64 Cal.App.3d 36, 39-40 [134 Cal.Rptr. 252]; *In re Marriage of Freiberg*, 57 Cal.App.3d 304, 310 [127 Cal.Rptr. 792].)

However, apportionment on the basis of the "time rule" is appropriate only where the amount of the retirement benefits is substantially related to the number of years of service. The rule and its rationale were aptly stated in *In re Marriage of Judd, supra.*, 68 Cal.App.3d at pages 522-523: "The most effective method of accomplishing the above result would be to determine the community interest to be that fraction of retirement assets, the numerator of which represents the length of service during the marriage but before the separation, and the denominator of which represents the total length of service by the employee-spouse. Such disposition would comport with what we have termed the 'time rule.' [Citation.] [¶] ... The reason why California courts have accepted this manner of division as properly implementive of the 'equal division' requirement of Civil Code section 4800 is apparent: *Where the total number of years served by an employee-spouse is a substantial factor in computing the amount of*

retirement benefits to be received by that spouse, the community is entitled to have its share based upon the length of service performed on behalf of the community in proportion to the total length of service necessary to earn those benefits. *The relation between years of community service to total years of service provides a fair gauge of that portion of retirement benefits attributable to community effort.*" (Italics added.) Thus it is that in each and all of the cited cases the amount to be received in retirement benefits depended upon or was substantially *9 related to the number of years of service rendered. (See *In re Marriage of Judd, supra.*, 68 Cal.App.3d at pp. 519, 522-523; *In re Marriage of Adams, supra.*, 64 Cal.App.3d at p. 186; *In re Marriage of Anderson, supra.*, 64 Cal.App.3d at p. 39; *In re Marriage of Freiberg, supra.*, 57 Cal.App.3d at p. 308.)

In the case at bench the amount of former husband's pension is not substantially related to the number of years he served in the Naval Reserve. The only relationship between the number of years of service and the pension is that to be eligible for the pension former husband must have served a minimum number of "qualifying" years, years in which he earned 50 or more points. That condition having been satisfied, all points earned, whether in a "qualifying" year or not, counted in fixing the amount of his pension. The number of points that can be earned in a year may be as high as 364 or as low as 1, depending on the nature and frequency of the service rendered, not the number of years served. Thus the amount of the pension is not a function of the number of years of service; the number of years of service during the marriage is not a fair gauge of the community contribution; and the court's apportionment of the pension on the basis of the number of "qualifying" years served as compared to the number of years of service during the marriage must be said to be unreasonable, arbitrary and an abuse of discretion.

The argument that without the reserve service during the marriage no pension at all would be received is correct, but it is of no significant help in resolving the problem. There would likewise be no pension but for former husband's service before the marriage and after the separation of the parties. To the extent service during the marriage contributed to former husband's rank and thus increased his base pay, former wife has no cause for complaint. The pension is based on the increased base pay, and she thus receives the benefit of the increased base pay. Indeed, she receives the benefit also of any increase in base pay resulting from former husband's reserve service after separation of the parties.

Spousal Support

The spousal support order made at the time of the dissolution required former husband to pay to former wife \$200 per month for one year, thereafter \$150 per month for one year and thereafter \$100 a month until further order of the court. At that time former wife was unemployed, and the court indicated to her that one reason it was making the stepdown order was to give her incentive to find employment. *10

Subsequently she did find employment and on May 7, 1974, former husband filed an order to show cause re modification in which he sought the termination of support. After hearing the court ordered the amount of the monthly payment reduced from \$150 to \$100 one year in advance of the time table set forth in the original order.

The instant proceedings were commenced by former husband's filing another order to show cause re modification for the termination of spousal support. This time his request for termination was based on the fact that the daughter of the parties born December 9, 1957, had married and moved from the residence which she had shared with former wife up to that time.

(4a) Former husband points out that at the hearing former wife admitted in her testimony that her expenses would be somewhat reduced because of the daughter's marriage and departure from the residence they shared. Former husband concludes that a change of circumstances was shown, and the trial court abused its discretion in declining to reduce the amount of or terminate spousal support. Not so.

In the first place, former husband's premise that a change of circumstances was shown does not support his conclusion that a modification or termination of spousal support was thereby required. (5) A modification of spousal support cannot be granted in the absence of proof of a change in circumstances. However, the converse is not true; a showing of changed circumstances does not necessarily mandate a modification of spousal support.

() In any event, there is no showing whatever that the trial court abused its discretion in requiring former husband to continue to pay spousal support in the amount of \$100 per month. Former wife is employed, but her gross earnings approximate \$692 per month. In addition her financial declaration disclosed income of \$100 per month in public assistance and \$95.33

per month paid to her by former husband on account of her interest in the Naval Reserve pension. She thus had gross income of \$887.33 per month and a monthly net of \$714.53. Her listed monthly expenses, which appear to be quite modest, amounted to \$816 per month, \$102 per month in excess of her net earnings. By contrast, husband's net monthly income was declared by him to be \$1,572 per month, and his monthly expenses were listed as \$1,355 per month. Thus, by his own figures former husband's net income exceeded his expenses by more than \$200 per month. The duration of the marriage was in excess of *11 27 years, and former wife is entitled to maintain a standard of living not substantially different from that of former husband, especially when former husband's own figures indicate that he is well able to pay the required support.

The court acted with propriety in declining to modify the amount of spousal support.

Having concluded that the apportionment of the Naval Reserve pension made by the trial court is erroneous, the question remains what disposition to make. (6)The requirement is that the apportionment of retirement benefits between the separate and community property estates must be reasonable and fairly representative of the relative contributions of the community and separate estates. (See *In re Marriage of Judd, supra.*, 68 Cal.App.3d at pp. 522-523; *In re Marriage of Adams, supra.*, 64 Cal.App.3d at p. 187; cf. *In re Marriage of Freiberg, supra.*, 57 Cal.App.3d at p. 312.) The basis for apportionment, however, is a matter committed to the judicial discretion of the trial court. (See *In re Marriage of Judd, supra.*, 68 Cal.App.3d at p. 522; *In re Marriage of Adams, supra.*; cf. *In re Marriage of Freiberg, supra.*) The discretion to be exercised is that of the trial court, not a reviewing court. (See *In re Marriage of Judd, supra.*) Although it is fairly obvious that apportionment on the basis of points as urged by former husband would be appropriate, we would usurp the function of the trial court by modifying the judgment to apportion the retirement benefits on that basis.

Accordingly, the order is reversed insofar as it establishes former wife's interest in the Naval Reserve pension, with directions to the trial court to redetermine the respective interests in the pension in a manner and on a basis consistent with this opinion. In all other respects the order appealed from is affirmed. In the interests of justice former wife shall recover costs on appeal, but the parties shall bear their own respective attorney fees on appeal.

Tamura, Acting P. J., and McDaniel, J., concurred.
*12
Cal.App.4.Dist.
In re Marriage of Poppe
97 Cal.App.3d 1, 158 Cal.Rptr. 500

END OF DOCUMENT

APPENDIX K

Reserve Retirement Point Summary Trial Exhibit

Beginning	End Date		No. Points			Separate Prop	Comm Prop
21-Jan-63	21-Jan-64	Active Duty	365	21-Jan-63	21-Mar-1963		59
				21-Mar-1963	21-Jan-1964	306	
21-Jan-64	21-Jan-65	Active Duty	366	21-Jan-1964	21-Jan-65	366	
21-Jan-65	21-Jan-66	Active Duty	365	21-Jan-1965	21-Jan-66	365	
21-Jan-66	09-Jan-67	Active Duty	353	21-Jan-1966	09-Jan-67	353	
09-Jan-67	09-Jan-68		N/A	9-Jan-1967	09-Jan-68	N/A	
21-Jan-68	21-Jan-69	Reserves	72	21-Jan-1968	21-Jan-69	72	
21-Jan-69	21-Jan-70		N/A	21-Jan-1969	21-Jan-70	N/A	
21-Jan-70	21-Jan-71		N/A	21-Jan-1970	21-Jan-71	N/A	
21-Jan-71	21-Jan-72		N/A	21-Jan-1971	21-Jan-72	N/A	
21-Jan-72	21-Jan-73		N/A	21-Jan-1972	21-Jan-73	N/A	
21-Jan-73	21-Jan-74		N/A	21-Jan-1973	21-Jan-74	N/A	
21-Jan-74	21-Jan-75		N/A	21-Jan-1974	21-Jan-75	N/A	
21-Jan-75	21-Jan-76		N/A	21-Jan-1975	21-Jan-76	N/A	
21-Jan-76	21-Jan-77		N/A	21-Jan-1976	21-Jan-77	N/A	
21-Jan-77	21-Jan-78		N/A	21-Jan-1977	21-Jan-78	N/A	
21-Jan-78	21-Jan-79		N/A	21-Jan-1978	21-Jan-79	N/A	
21-Jan-79	21-Jan-80		N/A	21-Jan-1979	21-Jan-80	N/A	
21-Jan-80	21-Jan-81		N/A	21-Jan-1980	21-Jan-81	N/A	
21-Jan-81	21-Jan-82	Reserves	72	21-Jan-1981	21-Jan-82	72	
21-Jan-82	21-Jan-83	Reserves	72	21-Jan-1982	21-Jan-83	72	
21-Jan-83	21-Jan-84	Reserves	72	21-Jan-83	28-Jan-83	0	
21-Jan-84	21-Jan-85	Reserves	72	28-Jan-83	21-Jan-84		72
21-Jan-85	21-Jan-86	Reserves	72	21-Jan-84	21-Jan-85		72
21-Jan-86	21-Jan-87	Reserves	72	21-Jan-85	21-Jan-86		72
21-Jan-87	21-Jan-88	Reserves	72	21-Jan-86	21-Jan-87		72
21-Jan-88	21-Jan-89	Reserves	72	21-Jan-87	21-Jan-88		72
21-Jan-89	21-Jan-90	Reserves	72	21-Jan-88	21-Jan-89		72
21-Jan-90	21-Jan-91	Reserves	72	21-Jan-89	21-Jan-90		72
21-Jan-91	21-Jan-92	Reserves	72	21-Jan-90	21-Jan-91		72
21-Jan-92	21-Jan-93	Reserves	72	21-Jan-91	21-Jan-92		72
21-Jan-93	21-Jan-94	Reserves	72	21-Jan-92	21-Jan-93		72
21-Jan-94	21-Jan-95	Reserves	72	21-Jan-93	21-Jan-94		72
21-Jan-95	21-Jan-96	Reserves	72	21-Jan-94	21-Jan-95		72
21-Jan-96	21-Jan-97	Reserves	72	21-Jan-95	21-Jan-96		72
21-Jan-97	10-Apr-97	Reserves	8	21-Jan-96	10-Apr-97		8

2,681

1,606

1,003

59.90% **40.10%**

times 1/2

Former Spouse's Interest **29.95%** 29.95%

Service Member's Interest **70.05%**

APPENDIX L

**DEPARTMENT OF DEFENSE AGENTS DESIGNATED
TO ACCEPT SERVICE OF PROCESS**

Military Retirees

(317)542-2155

1. Army, Navy, Air Force and Marine Corps Retirees

Navy

a. Garnishment of Retired Pay:

1. Active Duty, Reserve, Fleet Reserve of Retired Members:

DFAS-CL

Garnishment Operations (Code LL)

P.O. Box 998002

Cleveland, Ohio 44199-8002

(800)982-8459 or (216)522-5301

Director

Defense Finance & Accounting Service

Cleveland Center (Code LF)

P.O. Box 998002

Cleveland, Ohio 44199-8002

(800)321-1080 or (216)522-5036

b. SBP Former Spouse Beneficiary Registration:

Defense Financing and Accounting Service

U.S. Military and Annuitant Pay

P.O. Box 7130

London, KY 40742-7130

2. Process Affecting the Pay of Civilian Employees of the Department of the Navy, Including the Marine Corps:

2. Coast Guard Retirees:

Commanding Officer

Pay and Personnel Center

444 Quincy Street

Topeka, Kansas 66683-3591

(785) 339-2200

<http://www.uscg.mil/hq/psc/>

a. If currently employed at Navy or Marine Corps activities (including nonappropriated fund instrumentalities) or installations situated within the territorial jurisdiction of the issuing court, such process may be served on the commanding officer or head of such activity or installation, or principal assistant specifically designated in writing by such official.

b. In other cases involving civilian employees, such process may be serviced in the manner indicated below:

3. Public Health Service:

Office of General Counsel

Department of Health and Human Service

Room 5362

330 Independence Avenue, S.W.

Washington, DC 20201

(1) If pertaining to civil service personnel of the Navy or Marine Corps, such process may be served on:

Director of Civilian Personnel Law

Office of the General Counsel

Navy Department

Washington, DC 20390

Army

1. Civilian Employees in Germany:

Commander, 266th Theater Finance Corps

Attention: AEUCF-CPF

APO NY 09007-0137

049-6221-57-8911, Autovon: 370-8911

(2) If pertaining to non-civil service civilian personnel of Navy Exchanges or related nonappropriated fund instrumentalities administered by the Navy by Resale System Office, such process may be served on:

2. Nonappropriated Fund Civilian Employees of Army Post Exchange:

Army and Air Force Exchange Service

Attention: CM-G-RI

P.O. Box 660202

Dallas, Texas 75266-0202

(214)312-2011

Commanding Officer

Navy Resale System Office

Attention: Industrial Relations Officer

29th Street and Third Avenue

Brooklyn NY 11232

3. All other Army Personnel:

Director, DFAS--Indianapolis Center

Attention: DFAS-I-GG

Indianapolis, Indiana 46249

- (3) If pertaining to non-civil service personnel of Navy clubs, messes, or recreational facilities (non-appropriated funds), such process may be served on:

Chief of Navy Personnel
Director
Recreational Service Division
(Pers/NMPC-72)
Washington, DC 20370

Defense Finance and Accounting Service

Director
DFAS-Columbus Center
Attention: AEP
P.O. Box 182317
Columbus, Ohio 43218-2317
(614)338-7332

- (4) If pertaining to non-civil service civilian personnel of other nonappropriated fund instrumentalities which fall outside the purview of the Chief of Naval Personnel or the Commanding Officer, Navy Resale Systems Office, such as locally established morale, welfare, and other social and hobby clubs, such process may be served on the commanding officer of the activity concerned.
- (5) If pertaining to non-civil personnel of any Marine Corps nonappropriated fund instrumentalities, such process may be served on the commanding officer of the activity concerned.

Marine Corps

1. Active Duty and Reserve Military Members:

Director
DFAS-Kansas City Center (Code G)
Kansas City, MO 64197-0001
(816) 926-7102

2. For civilian employees of the Marine Corps, see the listing above for civilian employees of the Navy.

Air Force

1. Active Duty, Reserve and Air National Guard (ANG) Military Members and Civilian Employees of Appropriated Fund Activities:

Director
DFAS-Denver Center
Attention: GL
Denver, Colorado 80279-5000
(303)676-7461

2. Nonappropriated Fund Civilian Employees of Base Exchanges:

Army and Air Force Exchange Service
Attention: CM-G-RI
P.O. Box 650038
(214)782005 or (214)780-3111

3. Civilian Employees of All Other Air Force Nonappropriated Fund Activities:

HQ AFMWRC/GC
Randolph AFB, TX 78150-7000
(512)652-6691

APPENDIX M

102 P.L. 484, *4403; 106 Stat. 2315,
1992 Enacted H.R. 5006; 102 Enacted H.R. 5006 SEC. 4403.

10 USC §1293 TEMPORARY EARLY RETIREMENT AUTHORITY.

- (a) Purpose. The purpose of this section is to provide the Secretary of Defense a temporary additional force management tool with which to effect the drawdown of military forces through 1995.
- (b) Retirement for 15 to 20 Years of Service.
 - (1) During the active force drawdown period, the Secretary of the Army may --
 - (A) apply the provisions of section 3911 of title 10, United States Code, to a regular or reserve commissioned officer with at least 15 but less than 20 years of service by substituting "at least 15 years" for "at least 20 years" in subsection (a) of that section;
 - (B) apply the provisions of section 3914 of such title to an enlisted member with at least 15 but less than 20 years of service by substituting "at least 15" for "at least 20"; and
 - (C) apply the provisions of section 1293 of such title to a warrant officer with at least 15 but less than 20 years of service by substituting "at least 15 years" for "at least 20 years".
 - (2) During the active force drawdown period, the Secretary of the Navy may --
 - (A) apply the provisions of section 6323 of title 10, United States Code, to an officer with at least 15 but less than 20 years of service by substituting "at least 15 years" for "at least 20 years" in subsection (a) of that section;
 - (B) apply the provisions of section 6330 of such title to an enlisted member of the Navy or Marine Corps with at least 15 but less than 20 years of service by substituting "15 or more years" for "20 or more years" in the first sentence of subsection (a), in the case of an enlisted member of the Navy, and in the second sentence of subsection (b), in the case of an enlisted member of the Marine Corps; and
 - (C) apply the provisions of section 1293 of such title to a warrant officer with at least 15 but less than 20 years of service by substituting "at least 15 years" for "at least 20 years".
 - (3) During the active force drawdown period, the Secretary of the Air Force may --
 - (A) apply the provisions of section 8911 of title 10, United States Code, to a regular or reserve commissioned officer with at least 15 but less than 20 years of service by substituting "at least 15 years" for "at least 20 years" in subsection (a) of that section; and
 - (B) apply the provisions of section 8914 of such title to an enlisted member with at least 15 but less than 20 years of service by substituting "at least 15" for "at least 20".
- (c) Additional Eligibility Requirement. In order to be eligible for retirement by reason of the authority provided in subsection (b), a member of the Armed Forces shall --
 - (1) register on the registry maintained under section 1143a(b) of title 10, United States Code (as added by section 4462(a)); and
 - (2) receive information regarding public and community service job opportunities from the Secretary of Defense or [**2703] another source approved by the Secretary and be afforded, on request, counseling on such job opportunities.
- (d) Regulations. The Secretary of each military department may prescribe regulations and policies regarding the criteria for eligibility for early retirement by reason of eligibility pursuant to this section and for the approval of applications for such retirement. Such criteria may include factors such as grade, years of service, and skill.

- (e) Computation of Retired Pay. Retired or retainer pay of a member retired (or transferred to the Fleet Reserve or Fleet Marine Corps Reserve) under a provision of title 10, United States Code, by reason of eligibility pursuant to subsection (b) shall be reduced by 1/12th of 1 percent for each full month by which the number of months of active service of the member are less than 240 as of the date of the member's retirement (or transfer to the Fleet Reserve or Fleet Marine Corps Reserve).
- (f) Funding.
- (1) Notwithstanding section 1463 of title 10, United States Code, and subject to the availability of appropriations for this purpose, the Secretary of each military department shall provide in accordance with this section for the payment of retired pay payable during the fiscal years covered by the other provisions of this subsection to members of the Armed Forces under the jurisdiction of that Secretary who are being retired under the authority of this section.
 - (2) In each fiscal year in which the Secretary of a military department retires a member of the Armed Forces under the authority of this section, the Secretary shall credit to a subaccount (which the Secretary shall establish) within the appropriation account for that fiscal year for pay and allowances of active duty members of the Armed Forces under the jurisdiction of that Secretary such amount as is necessary to pay the retired pay payable to such member for the entire initial period (determined under paragraph (3)) of the entitlement of that member to receive retired pay.
 - (3) The initial period applicable under paragraph (2) in the case of a retired member referred to in that paragraph is the number of years (and any fraction of a year) that is equal to the difference between 20 years and the number of years (and any fraction of a year) of service that were completed by the member (as computed under the provision of law used for determining the member's years of service for eligibility to retirement) before being retired under the authority of this section.
 - (4) The Secretary shall pay the member's retired pay for such initial period out of amounts credited to the subaccount under paragraph (2). The amounts so credited with respect to that member shall remain available for payment for that period.
 - (5) For purposes of this subsection --
 - (A) the transfer of an enlisted member of the Navy or Marine Corps to the Fleet Reserve or Fleet Marine Corps Reserve shall be treated as a retirement; and
 - (B) the term "retired pay" shall be treated as including retainer pay.
- (g) Coordination With Other Separation Provisions.
- (1) A member of the Armed Forces retired under the authority of this section is not entitled to benefits under section 1174, 1174a, or 1175 of title 10, United States Code.
 - (2) Section 638a(b)(4)(C) of title 10, United States Code, is amended by inserting "(other than by reason of eligibility pursuant to section 4403 of the National Defense Authorization Act for Fiscal Year 1993)" after "any provision of law".
- (h) Members Receiving SSB or VSI. The Secretary of a military department may retire (or transfer to the Fleet Reserve or Fleet Marine Corps Reserve) pursuant to the authority provided by this section a member of a reserve component who before the date of the enactment of this Act was separated from active duty pursuant to an agreement entered into under section 1174a or 1175 of title 10, United States Code. The retired or retainer pay of any such member so retired (or transferred) by reason of the authority provided in this section shall be reduced by the amount of any payment to such member before the date of such retirement under the provisions of such agreement under section 1174a or 1175 of title 10, United States Code.
- (i) Active Force Drawdown Period. For purposes of this section, the active force drawdown period is the period beginning on the date of the enactment of this Act and ending on October 1, 1995.

APPENDIX N

10 U.S.C. §12731a.

Temporary Special Retirement Qualification Authority

(a) Retirement with at least 15 years of service.--For the purposes of section 12731 of this title, the Secretary concerned may--

(1) during the period described in subsection (b), determine to treat a member of the Selected Reserve of a reserve component of the armed force under the jurisdiction of that Secretary as having met the service requirements of subsection (a)(2) of that section and provide the member with the notification required by subsection (d) of that section if the member--

(A) as of October 1, 1991, has completed at least 15, and less than 20, years of service computed under section 12732 of this title; or

(B) after that date and before the end of the period described in subsection (b), completes 15 years of service computed under that section; and

(2) upon the request of the member submitted to the Secretary, transfer the member to the Retired Reserve.

(b) Period of authority.--The period referred to in subsection (a)(1) is the period beginning on October 23, 1992, and ending on December 31, 2001.

(c) Applicability subject to needs of the service.--(1) The Secretary concerned may limit the applicability of subsection (a) to any category of personnel defined by the Secretary in order to meet a need of the armed force under the jurisdiction of the Secretary to reduce the number of members in certain grades, the number of members who have completed a certain number of years of service, or the number of members who possess certain military skills or are serving in designated competitive categories.

(2) A limitation under paragraph (1) shall be consistent with the purpose set forth in section 4414(a) of the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102-484; 106 Stat. 2713).

(3) Notwithstanding the provisions of section 4415(2) of the Defense Conversion, Reinvestment, and Transition Assistance Act of 1992 (division D of Public Law 102-484; 106 Stat. 2714), the Secretary concerned may, consistent with the other provisions of this section, provide the notification required by section 12731(d) of this title to a member who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability. Such notification may not be made if the disability is the result of the member's intentional misconduct, willful neglect, or willful failure to comply with standards and qualifications for retention established by the Secretary concerned or was incurred during a period of unauthorized absence.

(d) Exclusion.--This section does not apply to persons referred to in section 12731(c) of this title.

(e) Regulations.--The authority provided in this section shall be subject to regulations prescribed by the Secretary of Defense and by the Secretary of Homeland Security with respect to the Coast Guard.

AUTHORIZATION TO START, STOP OR CHANGE AN ALLOTMENT

PRIVACY ACT STATEMENT

AUTHORITY: 37 U.S.C. Section 701, E.O. 9397.

PRINCIPAL PURPOSE: To permit starts, changes, or stops to allotments. To maintain a record of allotments and ensure starts, changes, and stops are in keeping with member's desires.

ROUTINE USES: In addition to those disclosures generally permitted under 5 U.S.C. Section 552a(b) of the Privacy Act, these records of information contained therein may specifically be disclosed outside the DoD as a routine use to the Federal Reserve banks to distribute payments made through the direct deposit system to financial organizations or their processing agents authorized by individuals to receive and deposit payments in their accounts. It may also be disclosed to the Treasury Department, Internal Revenue Service, Social Security Administration, Department of Veterans Affairs, Federal, state and local agencies for civil or criminal law enforcement. In addition it can be released for any of the blanket routine uses published at the beginning of the DFAS compilation of system of record notices.

DISCLOSURE: Voluntary; however, failure to provide the requested information as well as the Social Security number may result in the member not being able to start, change, or stop allotments.

TO BE COMPLETED BY ALLOTTER

1. BRANCH OF SERVICE (X one) <input type="checkbox"/> AIR FORCE <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> ARMY <input type="checkbox"/> NAVY		2. NAME OF ALLOTTER (Last, First, Middle Initial) (Print or type)		3. SSN		4. PAY GRADE	
5. ADDRESS OF ALLOTTER (Street or Box Number, City, State, ZIP Code)				6. DAYTIME TELEPHONE NUMBER (Include Area Code)		7. EFFECTIVE DATE (YYYYMM)	8. MONTHLY AMOUNT OF ALLOTMENT \$
9. NAME OF ALLOTTEE (First, Middle Initial, Last)				10. ALLOTMENT ACTION (X one) <input type="checkbox"/> START <input type="checkbox"/> STOP <input type="checkbox"/> CHANGE		11. TERM IN MONTHS	
12. CREDIT LINE (If applicable)				13. ALLOTMENT CLASS AUTHORIZED (X one) <input type="checkbox"/> C - CHARITY/CFC <input type="checkbox"/> D - DISCRETIONARY ALLOTMENTS (Includes dependent support, payment to financial institution, insurance, repayment of home loan, rent, etc. (Notes 1 and 2)) <input type="checkbox"/> F - CHARITY - EMERGENCY/ASSISTANCE FUND CONTRIBUTION <input type="checkbox"/> L - REPAYMENT OF LOAN TO SERVICE ORGANIZATION (Red Cross, Relief Society, etc. - Navy and Marine Corps only) <input type="checkbox"/> N - NSLI OR USGLI INSURANCE PREMIUM <input type="checkbox"/> T - PAYMENT OF DEBTS TO U.S., DELINQUENT STATE OR LOCAL INCOME/EMPLOYMENT TAXES <input type="checkbox"/> - OTHER (Specify)			
14. ALLOTTEE'S MAILING ADDRESS (Street or Box Number, City, State, ZIP Code)							
15. IF FOREIGN ADDRESS COMPLETE AS FOLLOWS (Province, Country)							
16. REMARKS							
17. COMPANY CODE/FINANCIAL INSTITUTION/ROUTING TRANSIT NUMBER				18. ACCOUNT NUMBER/POLICY NUMBER		<input type="checkbox"/> CHECKING <input type="checkbox"/> SAVINGS	
				19. TOTAL CLASS L AMOUNT \$		20. TOTAL CLASS T AMOUNT \$	

STATEMENT OF UNDERSTANDING

I understand that this allotment is legal and that by voluntarily completing this form, I am responsible for:

- Ensuring that the information is correct;
- Reviewing my Leave and Earnings Statement to ensure the allotment stops, starts, or changes as directed including amount and payee;
- Collecting overpayments from the receiver (payee) of the allotment, if I do not change or stop the allotment after a loan is repaid;
- Contacting the receiver (payee) of the allotment, at my expense, to obtain monthly statements for my personal records.

I also understand that any problems once the allotment is delivered to the receiver (payee) are beyond the control of the Defense Finance and Accounting Service (DFAS) and that DFAS is only responsible for ensuring proper delivery of any voluntary allotment for the period directed. I further understand that pursuant to conditions listed in the DoD 7000.14-R, Volume 7A, changes can be made by DFAS to an allottee's name, address, or account number.

21. SIGNATURE OF ALLOTTER	22. DATE (YYYYMMDD)
----------------------------------	----------------------------

NOTE 1. Must be different address than allotter. Each dependent allotment must have a different credit line. Only one support allotment per dependent is allowed.

NOTE 2. This is a voluntary allotment and can be to any payee you desire.

Legal assistance attorneys often use this chart from the Judge Advocate General's School, U.S. Army, to review and summarize military benefits available to former spouses during divorce consultations.

Uniformed Services Former Spouses' Protection Act ¹	Length of Time that Marriage Overlaps with Service Creditable for Retirement Purposes ³			
	Number of years			
Benefit for Former Spouses ²	0 to <10	10 to <15	15 to <20	20 or more
Division of Retired Pay ⁴	X	X	X	X
Designation as an SBP Beneficiary ⁵	X	X	X	X
DFAS Direct Payment⁶ of -				
Child Support	X	X	X	X
Alimony	X	X	X	X
Property Division ⁷		X	X	X
Health Care⁸				
Transitional ⁹			X	
Full ¹⁰				X
Insurance ¹¹	X	X	X	X
Commissary ¹²				X
PX ¹²				X
Dependent Abuse				
Retired Pay Property Share Equivalent ¹³		X	X	X
Transitional Compensation ¹⁴	X	X	X	X

▼ **Chart notes:**

1. Pub. L. 97-252, Title X, 96 Stat. 730 (1982), as amended. This chart reflects all changes to the Act through the amendments in the National Defense Authorization Act, Fiscal Year 1994, Pub. L. 103-160 (1993).

2. For guidance on obtaining a military identification card to establish entitlement for health care, commissary, and PX benefits, see appropriate service regulations (3.g. AR 640-3). Former spouses of reserve component members may be entitled to these benefits; see the following notes for applicable benefits.

3. Except for Dependent Abuse Victims Transitional Compensation payments, this chart assumes that the member serves long enough to retire from an active duty component or reserve component of the Armed Force (generally this will mean (s)he has twenty years of service creditable for retirement purposes, but can mean fifteen years in the case of the Voluntary Early Release and Retirement Program).

4. At least one court has awarded a portion of military retired pay to a spouse whom the retiree married after he retired, Konzen v. Konzen, 103 Wash.2d 470, 693 P.2d 97, cert denied, 473 U.S. 906 (1985)

5. Federal law does not create any minimum length of overlap for this benefit; the parties'

agreement or state law will control a former spouse's entitlement to designation an SBP beneficiary.

6. See 10 U.S.C. 1408 (d) & 1408 (e) and 32 C.F.R. part 63 for further guidance on mandatory language in the divorce decree or court-approved separation agreement. The former spouse initiates the direct payment process by sending a written request to the appropriate finance center.

7. While eligibility for direct payment does not extend to former spouses whose overlap of marriage and service is less than ten years, this is not a prerequisite to award of a share of retired pay as property to the former spouse (see Note 4).

8. To qualify for any health care provided or paid for by the military, the former spouse must be unremarried and must not be covered by an employer-sponsored health care plan; see 10 U.S.C. 1072(2)(F), 1072(2)(G) & 1072(2)(H). Department of the Army interpretation of this provision holds that termination of a subsequent marriage by divorce or death does not revive this benefit, but an annulment does. These remarriage and employer-insurance restrictions do not limit eligibility to enroll in the civilian health care insurance plan discussed in Note 11.

9. Transitional health care "was created by Pub. L. 98-625, 645 (C)(not codified), as a stop-gap measure while a civilian health care plan was negotiated for former spouses and other who lose an entitlement to receive military health care (see Note 11). The program subsequently was modified and narrowed by the National Defense Authorization Act, Fiscal Year 1989, Pub. L. 100-456, Title VI, 651, 102 Stat. 1990 (1988). Current program benefits are described at 10 U.S.C. 1078a, titled "Continued Health Benefits Coverage." Qualifying former spouses are those who are unremarried, who have no employer-sponsored health insurance, and who meet the "20/20/15" requirement (i.e., married to the member for at least 20 years, and the member has at least 20 years of service that are creditable for retirement purposes, and the marriage overlaps at least 15 years of the creditable service). Transitional health care now includes full military health care for 1 year after the date of the divorce, and during this period the former spouse is eligible to enroll in the civilian group health care plan negotiated by DOD (see Note 11).

Note that for health purposes, 10 U.S.C. 1072 (2)(G) treats a 20/20/15 former spouse as if he or she were a full 20/20/20 former spouse (20 years of marriage, 20 years of service, and 20 years of overlap) if the divorce decree is dated before April 1, 1995. A 20/20/15 former spouse of a reserve component retiree with a divorce decree prior to April 1, 1985, can receive full health care too, but only if the member survives to age 60 or if he or she elected to participate in the Reserve Component Survivor Benefit Program upon becoming retirement eligible.

10. "Full health care" includes health care at military treatment facilities and that provided through the CHAMPUS insurance program. A former spouse of a reserve component retiree is eligible for this benefit upon the retiree's 60th birthday (or on the day the retiree would have been 60 if (s)he dies before reaching age 60) if (s)he meets the normal qualification rules (i.e., an unremarried 20/20/20 former spouse who is not covered by an employer-sponsored health care plan); see 10 U.S.C. 1076 (b)(2).

11. Implementation of the Department of Defense Continued Health Care Benefit Program (CHCBP) was directed by Congress in the National Defense Authorization Act for Fiscal year 1993 (see 10 U.S.C. 1078a). It is a premium based program of temporary continued health benefits coverage available to eligible beneficiaries. Medical benefits mirror those available under the basic CHAMPUS program, but CHCBP is not part of CHAMPUS. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119). The CHCBP replaces the Uniformed Services Voluntary Insurance Program (USVIP).

12. Pursuant to statute and service regulations, commissary and PX benefits are to be available to a former spouse "to the same extent and on the basis as the surviving spouse of a retired member... Pub. L. 97-252, Title X 1005, 96 Stat. 737 (1982); see Army Regulation 640-3. The date of the divorce is no longer relevant for commissary and PX purposes. See Pub. L. 98-525, Title IV, 645, 98 Stat. 2549 (1984) (amending Uniformed Services Former Spouses' Protection Act 006(d). The former spouse must be "unmarried," and, unlike the rules for health care, any termination of a subsequent marriage revives these benefits. Qualified former spouses of reserve component retirees receive commissary and PX benefits when the retiree reaches age 60 (or when (s)he would have reached age 60 if the retiree dies before that time, but in such cases the entitlement arises only if the retiree elected to participate in the Reserve Component Survivor Benefit Plan when (s)he became retirement eligible; see AR 640-3). Notwithstanding the provision of the Act and the regulation, however, the extent of commissary and exchange privileges in overseas locations may be restricted by host-nation customs law.

13. When a retirement-eligible member receive a punitive discharge via court-martial, or is discharged via administrative separation processing, the members retirement benefits are lost. In certain cases where the court-martial or separation action was based on dependent abuse,

eligible spouses may receive their court-ordered share of retired pay (divided as property) as if the member had actually retired. Authority for these payments was created in the National Defense Authorization Act, Fiscal Year 1993, 653, Pub. L. 103-484. An overlap of marriage and service of at least ten years is a prerequisite to receipt of payments. The National Defense Authorization Act, Fiscal Year 1994, 555, Pub. L. 103-160, clarifies that eligibility begins on the date the sentence is approved and does not have to wait until the member is actually discharged. 14. The National Defense Authorization Act, Fiscal year 1994, 554, Pub. L. 103-160, also created authority for monthly transitional compensation to dependents of a non-retirement eligible member separated from the service by reason of dependent abuse.

▼ **Selected Former Spouses' Protection Act Information sites:**

<http://www.dfas.mil/money/garnish/index.htm>, DFAS Fact Sheet/Q&As, Application for Former Spouse Payments from Retired Pay

<http://www.odcsper.army.mil/default.asp?pageid=16f>, scroll down for FSPA information

http://www.odcsper.army.mil/Directorates/retire/former_spouses_protection_act/Default.asp, Retirement Services Office FSPA information

<http://usmilitary.about.com/careers/usmilitary/cs/divusfspa/index.htm>, About.com's USFSPA information collection.

<http://www.americanretirees.com/others.htm>, a "What others say" page with links to other comments on the FSPA. From The American Retirees Association,

<http://www.americanretirees.com/index.htm>, founded in 1984 for the exclusive purpose of addressing inequities in the Uniformed Services Former Spouses' Protection Act (USFSPA), Public Law 97-252 (Title 10 USC 1408).

Page Last Modified 10/29/2002

<p align="center">APPLICATION FOR FORMER SPOUSE PAYMENTS FROM RETIRED PAY <i>(Please read instructions on back and the Privacy Act Statement before completing this form.)</i></p>	<p align="center">OMB No. 0730-0008 OMB approval expires Dec 31, 2007</p>
<p>The public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate (0704-0008). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.</p> <p>PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ORGANIZATION. RETURN COMPLETED FORM TO THE APPROPRIATE SERVICE ADDRESS LISTED ON BACK.</p>	<p>FOR OFFICIAL USE</p>
<p>PRIVACY ACT STATEMENT</p>	
<p>AUTHORITY: Title 10 USC 1408; EO 9397.</p> <p>PRINCIPAL PURPOSE(S): To request direct payment through a Uniformed Service designated agent of court ordered child support, alimony, or division of property to a former spouse from the retired pay of a Uniformed Service member.</p> <p>ROUTINE USE(S): In addition to those disclosures generally permitted under 5 U.S.C. Section 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. Section 552a(b)(3) as follows: Records are provided to the Internal Revenue Service for normal wage and tax withholding purposes. The "Blanket Routine Uses" published at the beginning of the DFAS compilation of systems of records notices also apply.</p> <p>DISCLOSURE: Voluntary; however, failure to provide requested information may delay or make impossible processing this direct payment request.</p>	
<p>1. APPLICANT IDENTIFICATION</p>	<p>2. SERVICE MEMBER IDENTIFICATION</p>
<p>a. NAME <i>(As appears on court order) (Last, First, Middle Initial)</i></p>	<p>a. NAME <i>(Last, First, Middle Initial)</i></p>
<p>b. CURRENT NAME <i>(Last, First, Middle Initial)</i></p>	<p>b. SOCIAL SECURITY NUMBER</p>
<p>c. SOCIAL SECURITY NUMBER</p>	<p>c. BRANCH OF SERVICE</p>
<p>d. ADDRESS <i>(Street, City, State, ZIP Code)</i></p>	<p>d. ADDRESS <i>(Street, City, State, ZIP Code) (If known)</i></p>
<p>3. REQUEST STATEMENT</p>	
<p>I request direct payment from the retired pay of the above named Uniformed Service member based on the enclosed court order.</p> <p>I request payment of:</p> <p>(1) Child support in the amount of \$ _____ per month.</p> <p>(2) Alimony, spousal support or maintenance in the amount of \$ _____, or _____ percent of disposable retired pay per month.</p> <p>(3) A division of property in the amount of \$ _____, or _____ percent of disposable retired pay per month.</p> <p>I certify that any request for current child and/or spousal support is not being collected under any other wage withholding or garnishment procedure authorized by statute. Furthermore, I certify that the court order has not been amended, superseded or set aside and is not subject to appeal. As a condition precedent to payment, I agree to refund all overpayments and that they are otherwise recoverable and subject to involuntary collection from me or my estate, and I will notify the appropriate agent (as listed on back) if the operative court order, upon which payment is based, is vacated, modified, or set aside. I also agree to notify the appropriate agent (as listed on back) of a change in eligibility for payments. This includes notice of my remarriage, if under the terms of the court order or the laws of the jurisdiction where it was issued, remarriage causes the payments to be reduced or terminated; or notice of a change in eligibility for child support payments by reason of the death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payments from retired pay. I hereby acknowledge that any payment to me must be paid from disposable retired pay as defined by the statute and implementing regulations.</p>	

4. I HAVE ENCLOSED ALL PERTINENT DOCUMENTATION TO INCLUDE: (X as applicable)

a. A copy of the operative court order and other accompanying documents that provide for payment of child support, alimony or a division of retired pay as property, containing a certification dated by the clerk of the court within 90 days preceding the date the application is received by the designated agent.	
b. Evidence of the date(s) of my marriage to the member if the application is for the direct payment of a division of the member's disposable retired pay as property. Give MARRIAGE DATE (YYYYMMDD) in this block unless stated in court order.	
c. If payment request includes child support, give name(s) and birth date(s) of child(ren):	
(1) NAME OF CHILD (Last, First, Middle Initial)	(2) DATE OF BIRTH (YYYYMMDD)
d. Other information (please identify) or remarks.	

5a. APPLICANT'S SIGNATURE	b. DATE SIGNED
---------------------------	----------------

INSTRUCTIONS FOR COMPLETION OF DD FORM 2293

GENERAL. These instructions govern an application for direct payment from retired pay of a Uniformed Service member in response to court ordered child support, alimony, or a division of property, under the authority of 10 USC 1408.

SERVICE OF APPLICATION. You may serve the application by mail on the appropriate Uniformed Service designated agent. The Uniformed Services' designated agents are:

- (1) **ARMY, NAVY, AIR FORCE, AND MARINE CORPS:** Attn: DFAS-CL/GAG, Assistant General Counsel for Garnishment Operations, DEFENSE FINANCE AND ACCOUNTING SERVICE - CLEVELAND, P.O. Box 998002, Cleveland, OH 44199-8002;
- (2) **COAST GUARD:** Commanding Officer (LGL), United States Coast Guard, Human Resources Service and Information Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591;
- (3) **PUBLIC HEALTH SERVICE:** Attn: Retired Pay Section, CB, Division of Commissioned Personnel, PUBLIC HEALTH SERVICE, Room 4-50, 5600 Fishers Lane, Rockville, MD 20857-0001;
- (4) **NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION:** Same as U.S. Coast Guard.

IMPORTANT NOTE: Making a false statement or claim against the United States Government is punishable. The penalty for willfully making a false claim or false statement is a maximum fine of \$10,000 or maximum imprisonment of 5 years or both (18 USC 287 and 1001).

ITEM 1.

- a. Enter full name as it appears on the court order.
- b. Enter current name if different than it appears on court order.
- c. Enter Social Security Number.
- d. Enter current address.

ITEM 2.

- a. Enter former spouse's full name as it appears on the court order.
- b. Enter former spouse's Social Security Number.
- c. Enter former spouse's branch of service.
- d. Enter former spouse's current address, if known.

ITEM 3. Read the Request Statement carefully.

ITEM 4. A certified copy of a court order can be obtained from the court that issued the court order. Other documents include, but are not limited to, final divorce decree, property settlement order, and any appellate court orders. If the court order does not state that the former spouse was married to the member for ten years or more while the member performed ten years creditable service and the request is for payment of a division of property, the applicant must provide evidence to substantiate the ten years' marriage condition. Additional evidence must show that the ten years' requirement has been met, including: Uniformed Service orders, marriage certificate, and other documents that establish the period of marriage. Other information or documents included with the request should be clearly identified by the document's title and date. Remarks may be provided to clarify specific points.

ITEM 5. Self-explanatory.

Form **W-4P**
Department of the Treasury
Internal Revenue Service

Withholding Certificate for Pension or Annuity Payments

OMB No. 1545-0074

2006

Purpose. Form W-4P is for U.S. citizens, resident aliens, or their estates who are recipients of pensions, annuities (including commercial annuities), and certain other deferred compensation. Use Form W-4P to tell payers the correct amount of federal income tax to withhold from your payment(s). You also may use Form W-4P to choose (a) not to have any federal income tax withheld from the payment (except for eligible rollover distributions, or payments to U.S. citizens delivered outside the United States or its possessions) or (b) to have an additional amount of tax withheld.

pages 3 and 4. Your previously filed Form W-4P will remain in effect if you do not file a Form W-4P for 2006.

What do I need to do? Complete lines A through G of the **Personal Allowances Worksheet**. Use the additional worksheets on page 2 to adjust your withholding allowances for itemized deductions, adjustments to income, certain credits, or multiple pensions/more-than-one-income situations. If you do not want any income tax withheld (see *Purpose* above), you can skip the worksheets and go directly to the Form W-4P below.

Your options depend on whether the payment is periodic, nonperiodic, or an eligible rollover distribution, as explained on

Sign this form. Form W-4P is not valid unless you sign it.

Personal Allowances Worksheet (Keep for your records.)

- A Enter "1" for yourself if no one else can claim you as a dependent **A** _____
 - B Enter "1" if:
 - You are single and have only one pension; or
 - You are married, have only one pension, and your spouse has no income subject to withholding; or
 - Your income from a second pension or a job, or your spouse's pension or wages (or the total of all) is \$1,000 or less. **B** _____
 - C Enter "1" for your spouse. But, you may choose to enter "-0-" if you are married and have either a spouse who has income subject to withholding or you have more than one source of income subject to withholding. (Entering "-0-" may help you avoid having too little tax withheld.) **C** _____
 - D Enter number of dependents (other than your spouse or yourself) you will claim on your tax return **D** _____
 - E Enter "1" if you will file as head of household on your tax return **E** _____
 - F Child Tax Credit (including additional child tax credit):
 - If your total income will be less than \$55,000 (\$82,000 if married), enter "2" for each eligible child.
 - If your total income will be between \$55,000 and \$84,000 (\$82,000 and \$119,000 if married), enter "1" for each eligible child plus "1" additional if you have four or more eligible children **F** _____
 - G Add lines A through F and enter total here. (*Note. This may be different from the number of exemptions you claim on your tax return.*) **G** _____
- For accuracy, complete all worksheets that apply.
- If you plan to itemize or claim adjustments to income and want to reduce your withholding, see the **Deductions and Adjustments Worksheet** on page 2.
 - If you have more than one source of income subject to withholding or a spouse with income subject to withholding and your combined income from all sources exceeds \$35,000 (\$25,000 if married), see the **Multiple Pensions/More-Than-One-Income Worksheet** on page 2 to avoid having too little tax withheld.
 - If neither of the above situations applies, stop here and enter the number from line G on line 2 of Form W-4P below.

----- Cut here and give Form W-4P to the payer of your pension or annuity. Keep the top part for your records. -----

Form **W-4P**
Department of the Treasury
Internal Revenue Service

Withholding Certificate for Pension or Annuity Payments

OMB No. 1545-0074

2006

► For Privacy Act and Paperwork Reduction Act Notice, see page 4.

Type or print your full name.	Your social security number : : : :
Home address (number and street or rural route)	Claim or identification number (if any) of your pension or annuity contract
City or town, state, and ZIP code	

Complete the following applicable lines.

- 1 Check here if you do not want any federal income tax withheld from your pension or annuity. (Do not complete lines 2 or 3.) ►
- 2 Total number of allowances and marital status you are claiming for withholding from each periodic pension or annuity payment. (You may also designate an additional dollar amount on line 3.) ► (Enter number of allowances.)
 Marital status: Single Married Married, but withhold at higher "Single" rate
- 3 Additional amount, if any, you want withheld from each pension or annuity payment. (*Note. For periodic payments, you cannot enter an amount here without entering the number (including zero) of allowances on line 2.*) ► \$

Your signature ►

Date ►

Deductions and Adjustments Worksheet

Note. Use this worksheet only if you plan to itemize deductions, claim certain credits, or claim adjustments to income on your 2006 tax return.

- 1 Enter an estimate of your 2006 itemized deductions. These include qualifying home mortgage interest, charitable contributions, state and local taxes, medical expenses in excess of 7.5% of your income, and miscellaneous deductions. (For 2006, you may have to reduce your itemized deductions if your income is over \$150,500 (\$75,250 if married filing separately). See *Worksheet 3* in Pub. 919 for details.) . . . 1 \$ _____
- 2 Enter: $\left\{ \begin{array}{l} \$10,300 \text{ if married filing jointly or qualifying widow(er)} \\ \$ 7,550 \text{ if head of household} \\ \$ 5,150 \text{ if single} \\ \$ 5,150 \text{ if married filing separately} \end{array} \right\}$ 2 \$ _____
- 3 Subtract line 2 from line 1. If line 2 is greater than line 1, enter "-0-" 3 \$ _____
- 4 Enter an estimate of your 2006 adjustments to income, including alimony, deductible IRA contributions, and student loan interest 4 \$ _____
- 5 Add lines 3 and 4 and enter the total. (Include any credit amounts from *Worksheet 7* in Pub. 919.) 5 \$ _____
- 6 Enter an estimate of your 2006 income not subject to withholding (such as dividends or interest) 6 \$ _____
- 7 Subtract line 6 from line 5. Enter the result, but not less than "-0-" 7 \$ _____
- 8 Divide the amount on line 7 by \$3,300 and enter the result here. Drop any fraction. 8 _____
- 9 Enter the number from the **Personal Allowances Worksheet**, line G, page 1 9 _____
- 10 Add lines 8 and 9 and enter the total here. If you use the **Multiple Pensions/More-Than-One-Income Worksheet**, also enter this total on line 1 below. Otherwise, stop here and enter this total on Form W-4P, line 2, page 1 10 _____

Multiple Pensions/More-Than-One-Income Worksheet

Note. Complete only if the instructions under line G, page 1, direct you here. This applies if you (and your spouse if married filing a joint return) have more than one source of income subject to withholding (such as more than one pension, or a pension and a job, or you have a pension and your spouse works).

- 1 Enter the number from line G, page 1 (or from line 10 above if you used the **Deductions and Adjustments Worksheet**) 1 _____
- 2 Find the number in **Table 1** below that applies to the **LOWEST** paying pension or job and enter it here 2 _____
- 3 If line 1 is more than or equal to line 2, subtract line 2 from line 1. Enter the result here (if zero, enter "-0-") and on Form W-4P, line 2, page 1. Do not use the rest of this worksheet 3 _____

Note. If line 1 is less than line 2, enter "-0-" on Form W-4P, line 2, page 1. Complete lines 4-9 below to calculate the additional withholding amount necessary to avoid a year-end tax bill.

- 4 Enter the number from line 2 of this worksheet 4 _____
- 5 Enter the number from line 1 of this worksheet 5 _____
- 6 Subtract line 5 from line 4. 6 _____
- 7 Find the amount in **Table 2** below that applies to the **HIGHEST** paying pension or job and enter it here 7 \$ _____
- 8 Multiply line 7 by line 6 and enter the result here. This is the additional annual withholding needed 8 \$ _____
- 9 Divide line 8 by the number of pay periods remaining in 2006. For example, divide by 12 if you are paid every month and you complete this form in December 2005. Enter the result here and on Form W-4P, line 3, page 1. This is the additional amount to be withheld from each payment 9 \$ _____

Table 1: Multiple Pensions/More-Than-One-Income Worksheet

Married Filing Jointly				All Others			
If amount from HIGHEST paying pension or job is—	AND, amount from LOWEST paying pension or job is—	Enter on line 2 above	If amount from HIGHEST paying pension or job is—	AND, amount from LOWEST paying pension or job is—	Enter on line 2 above	If amount from LOWEST paying pension or job is—	Enter on line 2 above
\$0 - \$42,000	\$0 - \$4,500	0	\$42,001 and over	\$32,001 - \$38,000	6	\$0 - \$6,000	0
	4,501 - 9,000	1		38,001 - 46,000	7	6,001 - 12,000	1
	9,001 - 18,000	2		46,001 - 55,000	8	12,001 - 19,000	2
	18,001 and over	3		55,001 - 60,000	9	19,001 - 26,000	3
\$42,001 and over	\$0 - \$4,500	0	60,001 - 65,000	10	26,001 - 35,000	4	
			65,001 - 75,000	11	35,001 - 50,000	5	
			75,001 - 95,000	12	50,001 - 65,000	6	
			95,001 - 105,000	13	65,001 - 80,000	7	
			105,001 - 120,000	14	80,001 - 90,000	8	
			120,001 and over	15	90,001 - 120,000	9	
			120,001 and over	10			
			120,001 and over	10			

Table 2: Multiple Pensions/More-Than-One-Income Worksheet

Married Filing Jointly		All Others	
If amount from HIGHEST paying pension or job is—	Enter on line 7 above	If amount from HIGHEST paying pension or job is—	Enter on line 7 above
\$0 - \$60,000	\$500	\$0 - \$30,000	\$500
60,001 - 115,000	830	30,001 - 75,000	830
115,001 - 165,000	920	75,001 - 145,000	920
165,001 - 290,000	1,090	145,001 - 330,000	1,090
290,001 and over	1,160	330,001 and over	1,160

Additional Instructions

Section references are to the Internal Revenue Code.

When should I complete the form? Complete Form W-4P and give it to the payer as soon as possible. Get Pub. 919, *How Do I Adjust My Tax Withholding*, to see how the dollar amount you are having withheld compares to your projected total federal income tax for 2006. You may also use the Withholding Calculator on the IRS website at www.irs.gov/individuals for help in determining how many withholding allowances to claim on your Form W-4P.

Multiple pensions/more than one income. To figure the number of allowances that you may claim, combine allowances and income subject to withholding from all sources on one worksheet. You may file a Form W-4P with each pension payer, but do not claim the same allowances more than once. Your withholding will usually be more accurate if you claim all allowances on the Form W-4P for the highest source of income subject to withholding.

Other income. If you have a large amount of income from other sources not subject to withholding (such as interest, dividends, or capital gains), consider making estimated tax payments using Form 1040-ES, *Estimated Tax for Individuals*. Call 1-800-TAX-FORM (1-800-829-3676) to get Form 1040-ES and Pub. 505, *Tax Withholding and Estimated Tax*. You can also get forms and publications from the IRS website at www.irs.gov.

Note. Social security and railroad retirement payments may be includable in income. See Form W-4V, *Voluntary Withholding Request*, for information on voluntary withholding from these payments.

Withholding From Pensions and Annuities

Generally, federal income tax withholding applies to the taxable part of payments made from pension, profit-sharing, stock bonus, annuity, and certain deferred compensation plans; from individual retirement arrangements (IRAs); and from commercial annuities. The method and rate of withholding depends on (a) the kind of payment you receive, (b) whether the payments are delivered outside the United States or its possessions, and (c) whether the recipient is a nonresident alien individual, a nonresident alien beneficiary, or a foreign estate. Qualified distributions from a Roth IRA are nontaxable and, therefore, not subject to withholding. See page 4 for special withholding rules that apply to payments outside the United States and payments to foreign persons.

Because your tax situation may change from year to year, you may want to refigure your withholding each year. You can change the amount to be withheld by using lines 2 and 3 of Form W-4P.

Choosing not to have income tax withheld. You (or in the event of death, your beneficiary or estate) can choose not to have federal income tax withheld from your payments by using line 1 of Form W-4P. For an estate, the election to have no income tax withheld may be made by the executor or personal representative of the decedent. Enter the estate's EIN in the area reserved for "Your social security number" on Form W-4P.

You may not make this choice for eligible rollover distributions. See *Eligible rollover distribution—20% withholding* on page 4.

Caution. *There are penalties for not paying enough federal income tax during the year, either through withholding or estimated tax payments. New retirees, especially, should see Pub. 505. It explains your estimated tax requirements and describes penalties in detail. You may be able to avoid quarterly estimated tax payments by having enough tax withheld from your pension or annuity using Form W-4P.*

Periodic payments. Withholding from periodic payments of a pension or annuity is figured in the same manner as withholding from wages. Periodic payments are made in installments at regular intervals over a period of more than 1 year. They may be paid annually, quarterly, monthly, etc.

If you want federal income tax to be withheld, you must designate the number of withholding allowances on line 2 of Form W-4P and indicate your marital status by checking the appropriate box. Under current law, you cannot designate a specific dollar amount to be withheld. However, you can designate an additional amount to be withheld on line 3.

If you do not want any federal income tax withheld from your periodic payments, check the box on line 1 of Form W-4P and submit the form to your payer. However, see *Payments to Foreign Persons and Payments Outside the United States* on page 4.

Caution. *If you do not submit Form W-4P to your payer, the payer must withhold on periodic payments as if you are married claiming three withholding allowances. Generally, this means that tax will be withheld if your pension or annuity is at least \$1,480 a month.*

If you submit a Form W-4P that does not contain your correct taxpayer identification number (TIN), the payer must withhold as if you are single claiming zero withholding allowances even if you choose not to have federal income tax withheld.

There are some kinds of periodic payments for which you cannot use Form W-4P because they are already defined as wages subject to federal income tax withholding. These payments include retirement pay for service in the U.S. Armed Forces and payments from certain nonqualified deferred compensation plans and deferred compensation plans of exempt organizations described in section 457. Your payer should be able to tell you whether Form W-4P applies.

For periodic payments, your Form W-4P stays in effect until you change or revoke it. Your payer must notify you each year of your right to choose not to have federal income tax withheld (if permitted) or to change your choice.

Nonperiodic payments—10% withholding. Your payer must withhold at a flat 10% rate from nonperiodic payments (but see *Eligible rollover distribution—20% withholding* on page 4) unless you choose not to have federal income tax withheld. Distributions from an IRA that are payable on demand are treated as nonperiodic payments. You can choose not to have federal income tax withheld from a nonperiodic payment (if permitted) by submitting Form W-4P (containing your correct TIN) to your payer and checking the box on line 1. Generally, your choice not to have federal income tax withheld will apply to any later payment from the same plan. You cannot use line 2 for nonperiodic payments. But you may use line 3 to specify an additional amount that you want withheld.

Caution. *If you submit a Form W-4P that does not contain your correct TIN, the payer cannot honor your request not to have income tax withheld and must withhold 10% of the payment for federal income tax.*

Eligible rollover distribution—20% withholding. Distributions you receive from qualified pension or annuity plans (for example, 401(k) pension plans, IRAs, and section 457(b) plans maintained by a governmental employer) or tax-sheltered annuities that are eligible to be rolled over tax free to an IRA or qualified plan are subject to a flat 20% federal withholding rate. The 20% withholding rate is required, and you cannot choose not to have income tax withheld from eligible rollover distributions. Do not give Form W-4P to your payer unless you want an additional amount withheld. Then, complete line 3 of Form W-4P and submit the form to your payer.

Note. The payer will not withhold federal income tax if the entire distribution is transferred by the plan administrator in a direct rollover to a traditional IRA, qualified pension plan, governmental section 457(b) plan (if allowed by the plan), or tax-sheltered annuity.

Distributions that are (a) required by law, (b) one of a specified series of equal payments, or (c) qualifying "hardship" distributions are not "eligible rollover distributions" and are not subject to the mandatory 20% federal income tax withholding. See Pub. 505 for details. See also *Nonperiodic payments—10% withholding* on page 3.

Changing Your "No Withholding" Choice

Periodic payments. If you previously chose not to have federal income tax withheld and you now want withholding, complete another Form W-4P and submit it to your payer. If you want federal income tax withheld at the rate set by law (married with three allowances), write "Revoked" next to the checkbox on line 1 of the form. If you want tax withheld at any different rate, complete line 2 on the form.

Nonperiodic payments. If you previously chose not to have federal income tax withheld and you now want withholding, write "Revoked" next to the checkbox on line 1 and submit Form W-4P to your payer.

Payments to Foreign Persons and Payments Outside the United States

Unless you are a nonresident alien, withholding (in the manner described above) is required on any periodic or nonperiodic payments that are delivered to you outside the United States or its possessions. You cannot choose not to have federal income tax withheld on line 1 of Form W-4P. See Pub. 505 for details.

In the absence of a tax treaty exemption, nonresident aliens, nonresident alien beneficiaries, and foreign estates generally are subject to a 30% federal withholding tax under section 1441 on the taxable portion of a periodic or nonperiodic pension or annuity payment that is from U.S. sources. However, most tax treaties provide that private pensions and annuities are exempt from withholding and tax. Also, payments from certain pension plans are exempt from withholding even if no tax treaty applies. See Pub. 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*, and Pub. 519, *U.S. Tax Guide for Aliens*, for details. A foreign person should submit Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding*, to the payer before receiving any payments. The Form W-8BEN must contain the foreign person's TIN.

Statement of Federal Income Tax Withheld From Your Pension or Annuity

By January 31 of next year, your payer will furnish a statement to you on Form 1099-R, *Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.*, showing the total amount of your pension or annuity payments and the total federal income tax withheld during the year. If you are a foreign person who has provided your payer with Form W-8BEN, your payer instead will furnish a statement to you on Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, by March 15 of next year.

Privacy Act and Paperwork Reduction Act Notice

We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to provide this information only if you want to (a) request federal income tax withholding from periodic pension or annuity payments based on your withholding allowances and marital status, (b) request additional federal income tax withholding from your pension or annuity, (c) choose not to have federal income tax withheld, when permitted, or (d) change or revoke a previous Form W-4P. To do any of the aforementioned, you are required by sections 3405(e) and 6109 and their regulations to provide the information requested on this form. Failure to provide this information may result in inaccurate withholding on your payment(s).

Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and to cities, states, and the District of Columbia for use in administering their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The average time and expenses required to complete and file this form will vary depending on individual circumstances. For estimated averages, see the instructions for your income tax return.

If you have suggestions for making this form simpler, we would be happy to hear from you. See the instructions for your income tax return.

DIRECT DEPOSIT AUTHORIZATION

FOR PROCESSING FEDERAL NET PAYMENTS

(Refer to instructions for preparing authorization before completing the form.)

SECTION 1 - RECIPIENT INFORMATION

YOUR SOCIAL SECURITY NUMBER <table border="1"> <tr> <td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td> </tr> </table>											RETIREE'S SOCIAL SECURITY NUMBER <table border="1"> <tr> <td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td> </tr> </table>										

YOUR NAME *(Last, First MI)*

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

YOUR HOME TELEPHONE NUMBER <table border="1"> <tr> <td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td> </tr> </table>										YOUR WORK TELEPHONE NUMBER <table border="1"> <tr> <td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td> </tr> </table>									

YOUR HOME / CORRESPONDENCE ADDRESS

SECTION II - ACCOUNT INFORMATION

TYPE OF ACCOUNT <input type="checkbox"/> CHECKING <input type="checkbox"/> SAVINGS	TYPE OF PAYMENT <input type="checkbox"/> COMMUNITY PROPERTY <input type="checkbox"/> CHILD SUPPORT <input type="checkbox"/> ALIMONY
--	--

NOTE: IF YOU SELECTED A CHECKING ACCOUNT, A VOIDED PERSONAL CHECK OR SHAREDRAFT MUST BE ATTACHED, IN ADDITION TO COMPLETING ITEMS 8 THROUGH 12 OF THIS SECTION. SEE INSTRUCTIONS ON THE BACK OF THIS FORM.

ROUTING TRANSIT NUMBER

--	--	--	--	--	--	--	--	--	--

ACCOUNT NUMBER

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

ACCOUNT TITLE *(Account Holder's Name)*

FINANCIAL INSTITUTION NAME AND ADDRESS

SECTION III AUTHORIZATION

RECIPIENT'S SIGNATURE	DATE (YYYYMMDD)
-----------------------	-----------------

PRIVACY ACT STATEMENT

Collection of the information you are requested to provide on this form is authorized under 31 CFR 209 and/or 210. The information is confidential and is needed to prove entitlement to payments. The information will be used to process payment data from the federal agency to the financial institution and/or its agent.

INSTRUCTIONS FOR PREPARING AUTHORIZATION

PURPOSE - You may use this form to provide instructions for processing your net pay. Failure to provide the requested information may affect the processing of this form and may delay or prevent the receipt of payments through the Direct Deposit / Electronic Funds Transfer Program.

SECTION I - EMPLOYEE / MEMBER / ANNUITANT INFORMATION (ITEMS 1-5)

You must complete all blocks after carefully reading the instructions and Privacy Act Statement. You must keep the agency informed of any address change to remain qualified for payments.

SECTION II - DIRECT DEPOSIT ACCOUNT INFORMATION

ITEM 6 - TYPE OF ACCOUNT - Place "X" in the appropriate box, to indicate if you want your payment to be sent to a checking or savings account.

ITEM 7 - TYPE OF PAYMENT - Place an "X" in the appropriate box to indicate what type of payment you want sent by Direct Deposit.

ITEM 8 - ROUTING TRANSIT NUMBER - Your financial institution's 9-digit routing transit number. See the illustration below.

ITEM 9 - ACCOUNT NUMBER - Your account number at your financial institution. See the illustration below.

ITEM 10 - ACCOUNT TITLE - The depositor's name on the account at the financial institution. See the illustration below.

ITEM 11 - FINANCIAL INSTITUTION NAME / ADDRESS - The institution to which payments are to be directed
See the illustration below.

The illustration shows a check with the following fields and labels:

- 10**: A bracket above the top line of the check, which contains the text: "NAME OF DEPOSITOR", "STREET ADDRESS", "CITY, STATE, ZIP CODE".
- 101**: A number written in the top right corner of the check.
- 20**: A number written on the line below the top line, followed by a dollar sign (\$) and a box for cents.
- DOLLARS**: The word "DOLLARS" written below the line with the dollar sign.
- 11**: A bracket on the left side of the check, pointing to the text: "NAME OF YOUR BANK", "Payable Through Another Bank", "For".
- 8**: A bracket below the first eight digits of the MICR line: "99999999 9".
- 9**: A bracket below the last digit of the MICR line: "000 000 000".
- CHECK NUMBER**: A bracket below the last three digits of the MICR line: "0101".

8 - ROUTING TRANSIT NUMBER - Examine your deposit slip or check for items labeled 9 in the above sample. Is the Routing Transit Number (RTN) eight numbers in a row followed by a space and then one number? Is the first number of the RTN "0," "1," "2," or "3"? If the answer to both questions is "yes" enter the numbers from your deposit slip or check on the reverse of this form in Item 9. Otherwise, call your financial institution and ask them to provide you with their RTN.

9 - ACCOUNT NUMBER - Include dashes where the symbol **|||** appears on your check or deposit slip. Be sure not to include the check number (#101 in the example) or deposit slip number as part of your Account Number in Item 9. If you cannot determine your Account Number, contact your financial institution.

10 - ACCOUNT TITLE - Must include recipient's name.

11 - FINANCIAL INSTITUTION NAME / ADDRESS - If your check or sharedraft includes "Payable Through" under the bank name, contact the financial institution to help obtain the correct Routing Transit Number for Direct Deposit.

SECTION III - AUTHORIZATION

ITEMS 12 AND 13 - You must sign and date this form before the authorization can be processed.

FOR CHANGES - You must complete and submit a new "Direct Deposit Authorization" form to the applicable DoD agency. We recommend that you maintain accounts at both financial institutions until the new institution receives your Direct Deposit payments.

FOR CANCELLATIONS - This authorization will remain in effect until you cancel by providing a written notice to the DoD Agency or by your death or legal incapacity. Upon cancellation, you should notify the receiving financial institution. The authorization may be cancelled by the financial institution by providing you a written notice 30 days in advance of the cancellation date. You must immediately advise the DoD Agency if the authorization is cancelled by the financial institution. The financial institution cannot cancel the authorization by advice to the Government Agency.

APPENDIX T

Letter to DFAS regarding Registration of Former Spouse's Entitlement to Direct Payment of Court-ordered Award of Military Retired Pay:

August 17, 2006

Defense Finance and Accounting Service--Cleveland
Attention: Garnishment Operations
P.O. Box 998002
Cleveland, OH 44199-8002

Certified Mail
Return Receipt Requested

Re: Service Member
SSN: ***-**-****
Registration of Former Spouse's entitlement to direct payment of
Court-ordered award of military retired pay

Dear Sir/Madam:

I represent Ms. Former Spouse (hereinafter referred to as "Former Spouse"), the former spouse of the United States Navy member/retiree, Rate/Rank Service Member (hereinafter referred to as "Service Member").

MILITARY RETIREMENT APPORTIONMENT REQUEST

Pursuant to the terms of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. §1408, as amended, I am enclosing the following documentation:

1. Application For Former Spouse Payments From Retired Pay, DD FORM 2293.
2. Copy of the parties' Decree of Divorce that has been certified within the last 90 days.
3. Copy of the parties' Domestic Relations Order (Military Retirement) that has been certified within the last 90 days.
4. Certificate of Finality of Court Order.
5. Copy of the parties' marriage certificate.
6. Withholding Certificate for Pension or Annuity Payments, FORM W-4, Department of Treasury OMB No. 1545-0415 signed by applicant
7. Fast Start Direct Deposit authorization, FMS Form 2231

The Decree of Divorce and the Domestic Relations Order (Military Retirement) award to Former Spouse XX.XX% of Service Member's disposable retired pay, as well as all cost-of-living-related increases related thereto. Former Spouse was married to Service Member at least ten years during which Service Member performed at least ten years of service creditable toward retirement.

The Domestic Relations Order (Military Retirement) sets forth the pertinent information required by the Uniformed Services Former Spouses' Protection Act.

The court entering the Decree of Divorce and the Domestic Relations Order (Military Retirement) was a court of competent jurisdiction to hear divorce matters and divide property, and a decree was entered in accordance with the laws of the State of Texas.

Neither the Decree of Divorce nor the Domestic Relations Order (Military Retirement) have been appealed and are final judgments. Additionally, neither order has been amended or superseded.

Please consider this letter a formal request on behalf of Former Spouse that you make payments directly to her in the amount of retired pay specifically provided for in the enclosed court order. The payments should be sent to Former Spouse as specified in the order as follows:

Mr. Former Spouse Attorney
100 Delarosa, Suite 100
San Antonio, Texas 78205

I would appreciate your prompt acknowledgment of receipt of this letter and the enclosed documents. If further information is required, please let me know, and I will promptly furnish it to you.

I look forward to hearing from you in the near future.

Sincerely yours,

Former Spouse Attorney

FSA/xxx

Encl.

cc: Ms. Former Spouse

APPENDIX U

In Re: Cause No. 97-XXXX-1
In the Matter of the Marriage of JAMES SAILOR and JANE SAILOR
19th District Court, McLennan County, Texas
Date Decree of Divorce/Domestic Relations Order (Military Retirement) Signed: December
9, 1997

CERTIFICATE OF FINALITY OF COURT ORDER

I, JAMES B. ATTORNEY, certify that the enclosed Decree of Divorce and Domestic Relations Order (Military Retirement) are final decrees pursuant to the requirements of 10 U.S.C. §1408(a)(3) in that:

<SELECT ONE OF THE FOLLOWING.>

XX The Court Order is one from which no appeal may be taken.

The Court Order is one from which no timely appeal has been taken.

A timely appeal was taken from the Court Order, and the appeal has been finally decided. Enclosed is a copy of the decision of the Appellate Court.

I also certify that:

<SELECT ONE OF THE FOLLOWING.>

XX The Court Order has not been in any way amended or superseded.

The Court Order was amended. Enclosed is a copy of all amending Orders.

Respectfully submitted,

HIGDON, HARDY & ZUFLACHT, L.L.P.
12000 Huebner Road, Suite 200
San Antonio, Texas 78230-1210
Telephone: (210) 349-9933
Telecopier: (210) 349-9988
Email: jnhigdon@hhzlaw.com

By: _____
JAMES N. HIGDON
TSB#09590500
ATTORNEYS FOR JANE SAILOR

APPENDIX V

SURVIVOR BENEFIT PLAN (SBP) ELECTION STATEMENT FOR FORMER SPOUSE COVERAGE

(Please read Privacy Act Statement and Instructions on back BEFORE completing form.)

SECTION I - ELECTION OF COVERAGE - RETIRED MEMBERS ONLY

RETIRED MEMBERS changing from spouse or spouse and child(ren) coverage to former spouse or former spouse and child(ren) coverage.

RETIRING MEMBERS must complete required section of DD Form 2656 to elect coverage for former spouse or former spouse and child(ren).

1. DUE TO DIVORCE, CHANGE MY SBP COVERAGE TO (X one)

*NOTE: If an election included child(ren), list in Item 10 ONLY the child(ren) resulting from the marriage of the member and the former spouse. Include the date of birth and SSN for each child.

FORMER SPOUSE FORMER SPOUSE AND CHILD(REN)*

SECTION II - RETIRED AND RETIRING MEMBERS

2. ARE YOU CURRENTLY MARRIED? (X one. If "YES," complete a. - d.)

		YES	NO
a. NAME OF CURRENT SPOUSE (Last, First, Middle Initial)	b. SSN OF CURRENT SPOUSE	c. DATE OF CURRENT MARRIAGE (YYYYMMDD)	
d. ADDRESS OF CURRENT SPOUSE: (1) Street (Include apartment number)	(2) City	(3) State	(4) ZIP Code

3. IS THIS ELECTION BEING MADE PURSUANT TO THE REQUIREMENTS OF A COURT ORDER? (X one)

YES	NO
-----	----

4. IS THIS ELECTION BEING MADE PURSUANT TO A WRITTEN AGREEMENT PREVIOUSLY ENTERED INTO VOLUNTARILY AS PART OF OR INCIDENT TO A PROCEEDING OF DIVORCE, DISSOLUTION OR ANNULMENT? (X one)

--	--

5. IF "YES" TO ITEM 4, WAS SUCH A VOLUNTARY WRITTEN AGREEMENT INCORPORATED IN, RATIFIED, OR APPROVED BY A COURT ORDER? (X one)

--	--

6. DATE OF BIRTH OF FORMER SPOUSE (YYYYMMDD)	7. DATE MARRIED TO FORMER SPOUSE (YYYYMMDD)	8. DATE DIVORCED FROM FORMER SPOUSE (YYYYMMDD)	9. HAS FORMER SPOUSE REMARRIED? (If "YES", give date - YYYYMMDD)
			<input type="checkbox"/> NO <input type="checkbox"/> YES

10. DEPENDENT CHILDREN (To be completed only by retired members electing former spouse and child(ren) coverage. Continue in Item 11, "Remarks," if necessary.)

a. NAME (Last, First, Middle Initial)	b. DATE OF BIRTH (YYYYMMDD)	c. SSN	d. RELATIONSHIP (Son, daughter, etc.)	e. DISABLED? (Yes/No)

11. REMARKS

SECTION III - CERTIFICATIONS - RETIRED AND RETIRING MEMBERS AND FORMER SPOUSES

12. MEMBER				13. FORMER SPOUSE TO BE COVERED			
a. NAME (Last, First, Middle Initial)		b. SSN		a. NAME (Last, First, Middle Initial)		b. SSN	
c. SIGNATURE				c. SIGNATURE			
d. ADDRESS				d. ADDRESS			
(1) Street (Include apartment number)				(1) Street (Include apartment number)			
(2) City		(3) State	(4) ZIP Code	(2) City		(3) State	(4) ZIP Code
14. MEMBER'S WITNESS				15. FORMER SPOUSE'S WITNESS			
a. NAME (Last, First, Middle Initial)				a. NAME (Last, First, Middle Initial)			
b. SIGNATURE		c. DATE SIGNED		b. SIGNATURE		c. DATE SIGNED	
d. ADDRESS				d. ADDRESS			
(1) Street (Include apartment number)				(1) Street (Include apartment number)			
(2) City		(3) State	(4) ZIP Code	(2) City		(3) State	(4) ZIP Code

PRIVACY ACT STATEMENT

AUTHORITY: Public Law (PL) 92-425, September 21, 1972; PL 97-252, September 8, 1982; PL 98-94, September 24, 1983; PL 98-525, October 19, 1984; PL 99-145, November 14, 1986; and EO 9397.

PRINCIPAL PURPOSE(S): To establish a Survivor Benefit Plan election for a servicemember's former spouse.

ROUTINE USE(S): Information may be provided to the Internal Revenue Service to resolve matters relating to an individual's claim for tax withholding; and, to the Department of Justice or to state and local governments when a question of law, court order or other conflicting interest is raised concerning an individual's declaration.

DISCLOSURE: Voluntary; however, failure to furnish requested information may result in delay in initiating Survivor Benefit Plan.

INSTRUCTIONS

GENERAL.

Type or print all information in ink.

RETIRED MEMBERS: Complete Sections I, II, and III. If electing former spouse and child(ren) coverage, provide information pertaining to eligible child(ren) in Item 10, "Dependent Children."

RETIRING MEMBERS: Complete Sections II and III, but make the election on DD Form 2656, "Data for Payment of Retired Personnel."

ALL MEMBERS AND FORMER SPOUSES must complete Section III.

When the form has been completed (ensure it is signed by both member and former spouse, and is properly witnessed), submit it to:

DFAS - US Military Retirement Pay
PO Box 7130
London, KY 40742-7130

Attach a certified copy of the divorce decree, amendment, or other documentation as described in Items 3, 4, and 5. If not received by DFAS within the first year following the date of divorce, the election will be invalid.

SECTION I.

ITEM 1. Retired member places an X in the appropriate block to indicate whether election is for former spouse, or former spouse with child(ren) coverage.

SECTION II.

ITEM 2. Indicate member's marital status by marking appropriate block. If "Yes," complete 2.a. through 2.d.

- a. Provide name of member's current spouse.
- b. and c. Self-explanatory.
- d. Provide member's current spouse's address, if different from the member's address. Enter "Same" if the member and spouse have the same correspondence address.

ITEMS 3, 4, and 5. Mark the block that reflects legal basis for coverage.

ITEMS 6 and 7. Self-explanatory.

ITEM 8. Enter date of divorce decree, or amendment requiring SBP.

ITEM 9. Mark the appropriate block. If "Yes," provide the date that member's former spouse remarried. Former spouse may remarry after age 55 and eligibility will not be affected. If former spouse remarries before age 55, coverage is suspended and premiums are not deducted from member's retired pay for the duration of that marriage. If former spouse's marriage ends by death, divorce, or annulment, coverage will resume. Retiree or former spouse must notify DFAS of any changes in former spouse's marital status, providing appropriate documentation.

ITEM 10. Retired members electing former spouse and child(ren) must list eligible children in this section. Only children resulting from the marriage of the member and the former spouse are covered in a former spouse and child(ren) election. The former spouse is the primary beneficiary; children receive an annuity only if the former spouse remarries before age 55 or dies. Indicate in block 10.e. if the child is incapable of self support and attach substantiating documentation, if available. Eligible children of retiring members should be listed in Block 25 of DD Form 2656.

ITEM 11. This block may be used for comments or additional information not covered in the form.

SECTION III.

ITEMS 12 through 15. Self-explanatory.

APPENDIX W

**SURVIVOR BENEFIT PLAN (SBP)
AND RESERVE COMPONENT SURVIVOR BENEFIT PLAN (RCSBP)
OPEN ENROLLMENT ELECTION**

*(Public Law 108-375) (October 1, 2005 - September 30, 2006)
(Please read Privacy Act Statement and Instructions before completing form.)*

SECTION I - MEMBER INFORMATION

1. NAME (Last, First, Middle Initial)		2. SSN	3. RETIREMENT/ TRANSFER DATE (YYYYMMDD)	4. RANK/PAY GRADE/ BRANCH OF SERVICE	5. DATE OF BIRTH (YYYYMMDD)
6. CORRESPONDENCE ADDRESS (Ensure your finance center or reserve personnel center is advised whenever your correspondence address changes.)					
a. STREET ADDRESS (Include apartment number)	b. CITY	c. STATE	d. ZIP CODE	e. TELEPHONE (Incl. area code)	
f. E-MAIL ADDRESS (Optional)					

SECTION II - BENEFICIARY INFORMATION (This section must be completed regardless of SBP/RCSBP Election.)

7. SPOUSE					
a. NAME (Last, First, Middle Initial)			b. SSN	c. DATE OF BIRTH (YYYYMMDD)	
8. CORRESPONDENCE ADDRESS (Complete if address is different from member's address.)					
a. STREET ADDRESS (Include apartment number)	b. CITY	c. STATE	d. ZIP CODE	e. TELEPHONE (Incl. area code)	
9. DATE OF MARRIAGE (YYYYMMDD)	10. PLACE OF MARRIAGE (See Instructions)				
11. DEPENDENT CHILDREN (Indicate which child(ren) resulted from marriage to former spouse by entering (FS) after relationship in column d.)					
a. NAME (Last, First, Middle Initial)	b. SSN	c. DATE OF BIRTH (YYYYMMDD)	d. RELATIONSHIP (Son, daughter, stepson, etc.)	e. INCAPACITATED? (Yes/No)	

SECTION III - ELECTION OF COVERAGE

12. BENEFICIARY CATEGORY(IES) (Initial one item only.) (See Instructions.) I ELECT COVERAGE FOR:					
a. SPOUSE ONLY.					
b. SPOUSE AND CHILD(REN).					
c. CHILD(REN) ONLY.					
d. NATURAL PERSON WITH INSURABLE INTEREST (Complete Item 14).					
e. FORMER SPOUSE (Complete DD 2656-1, "Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage", or Coast Guard Form CG PSC-4700, "Coast Guard & NOAA Retired Pay Account Worksheet and Survivor Benefit Plan Election".)					
f. FORMER SPOUSE AND DEPENDENT CHILD(REN) OF THAT MARRIAGE (Complete DD 2656-1, "Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage", or Coast Guard Form CG PSC-4700, "Coast Guard & NOAA Retired Pay Account Worksheet and Survivor Benefit Plan Election".)					
13. LEVEL OF COVERAGE (Initial one item only. Complete UNLESS 12.d. was selected above.)					
a. I ELECT COVERAGE BASED ON FULL GROSS RETIRED PAY.					
b. I ELECT COVERAGE BASED ON A REDUCED BASE AMOUNT OF \$ _____ (See Instructions).					
c. I ELECT TO INCREASE MY CURRENT REDUCED BASE AMOUNT TO A HIGHER BASE AMOUNT THAT IS LESS THAN FULL GROSS RETIRED PAY (Enter desired base amount \$ _____).					
14. INSURABLE INTEREST BENEFICIARY					
a. NAME (Last, First, Middle Initial)		b. SSN	c. RELATIONSHIP		d. DATE OF BIRTH (YYYYMMDD)
e. STREET ADDRESS (Include apartment number)			f. CITY	g. STATE	h. ZIP CODE

SECTION IV - REMARKS

15. USE THIS SECTION TO CONTINUE AN ITEM OR MAKE ADDITIONAL COMMENTS.

SECTION V - MARITAL STATUS HISTORY *(See Instructions)*

16. INDICATE DATE(S) OF PREVIOUS MARRIAGE(S) AND DIVORCE(S), IF ANY.

SECTION VI - ENROLLMENT PREMIUM PAYMENT INFORMATION*(Payments under this section are in addition to normal monthly premiums. Use the Premium Tables to determine the amount owed.)***17. ENROLLMENT PREMIUM OPTIONS** *(Initial one) (See Instructions)*a. IMMEDIATE FULL ENROLLMENT PREMIUM PAYMENT OF \$ _____ *(payment attached).*b. IMMEDIATE PARTIAL ENROLLMENT PREMIUM PAYMENT OF \$ _____ *(payment attached).* The remainder due will be deducted from retired pay in 24 monthly installments.

c. FULL ENROLLMENT PREMIUM AMOUNT DEDUCTED FROM RETIRED PAY IN 24 MONTHLY INSTALLMENTS

SECTION VII - MEMBER OF A RESERVE COMPONENT*(Complete only if you are a member or a former member of a Reserve Component who has completed qualifying service for retired pay at age 60.)***18. I ELECT RESERVE COMPONENT SURVIVOR BENEFIT PLAN (RCSBP)** *(Initial one)*a. CHANGE MY ELECTION FROM DEFERRED TO IMMEDIATE ANNUITY *(from Option B to Option C).*b. DEFERRED ANNUITY UNTIL AGE 60 *(Option B).*c. IMMEDIATE ANNUITY *(Option C).***NOTE:** I understand that if I was required to elect SBP for a former spouse and that former spouse submitted a deemed election, any RCSBP election I make during this open enrollment period shall be voided and any premiums I pay will be returned.**SECTION VIII - SPOUSE CONCURRENCE FOR RESERVE COMPONENT SURVIVOR BENEFIT PLAN ELECTION ONLY***(Required when a Reserve member is married and elects child(ren) only coverage or does not elect full immediate spouse coverage.)***19. SPOUSE.**

I hereby concur with the Reserve Component Survivor Benefit Plan election made by my spouse. I have signed this statement of my free will.

a. SIGNATURE

b. DATE SIGNED (YYYYMMDD)

20.a. WITNESS NAME *(Last, First, Middle Initial)*

b. SIGNATURE

c. DATE SIGNED (YYYYMMDD)

d. STREET ADDRESS *(Include apartment number)*

e. CITY

f. STATE

g. ZIP CODE

SECTION IX - CERTIFICATION21. Under penalties of perjury, I certify that all statements on this form are made with full knowledge of the penalties for making false statements. *(18 U.S. Code 287 and 1001 provide for a penalty of not more than \$10,000 fine, or 5 years in prison or both.)* I further understand that my enrollment in the SBP/RCSBP is contingent upon payment of all premiums due. I understand this election is irrevocable, except as described in the instructions, and that the election is void if I do not live for 24 months from the effective date of the election.

a. MEMBER SIGNATURE

b. DATE SIGNED (YYYYMMDD)

**SURVIVOR BENEFIT PLAN (SBP)
AND RESERVE COMPONENT SURVIVOR BENEFIT PLAN (RCSBP)
OPEN ENROLLMENT ELECTION**

(Public Law 108-375) (October 1, 2005 - September 30, 2006)

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S. Code 1401; 10 U.S. Code 2771; 10 U.S. Code 1477; PL 92-425 (September 21, 1972, as amended) and EO 9397.

PRINCIPAL PURPOSE(S): To permit eligible individual to make Survivor Benefit Plan, Reserve Component Survivor Benefit Plan elections during the open enrollment period (October 1, 2005 - September 30, 2006).

ROUTINE USE(S): None.

DISCLOSURE: Voluntary; however, failure to furnish requested information will result in delays in adjusting pay and amounts not being properly computed.

INSTRUCTIONS

GENERAL.

1. Read these instructions carefully before completing the form. Please print legibly.

2. Ensure that you advise your finance center (see Item 3 below for address) of your marital status, correspondence and check address changes, at all times. Reserve component members must notify their personnel center (see Item 4 below for address) of their marital status and correspondence address at all times.

3. For retirees who are entitled to receive retired pay, regardless of VA, Civil Service offset/waiver, mail your election (certified or registered mail with return receipt requested is strongly recommended) to the appropriate Uniformed Service designated agent. The Uniformed Services' designated agents are:

(a) **ARMY, NAVY, AIR FORCE AND MARINE CORPS:** Director, DFAS-US Military Retired Pay, PO Box 7130, London, KY 40742-7130;

(b) **COAST GUARD:** Commanding Officer (RAS), USCG Personnel Service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591;

(c) **PUBLIC HEALTH SERVICE:** Office of Commissioned Corps Support Services, Compensation Branch, 5600 Fishers Lane, Room 4-50, Rockville, MD 20857;

(d) **NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION:** Same as U.S. Coast Guard.

4. For Reserve Members who have not received retired pay, mail your election (certified or registered mail with return receipt attached is strongly recommended) to the appropriate Branch of Service as follows:

(a) **ARMY:** Commander, Human Resources Command - St. Louis, ATTN: AHRC-PAP-T, 1 Reserve Way, St. Louis, MO 63132-5200;

(b) **NAVY:** Navy Reserve Personnel Center (Code N32), 5722 Integrity Drive, Building 239, Millington, TN 38054;

(c) **AIR FORCE:** Headquarters, ARPC/DPSSE, 6760 E. Irvington Place, Denver, CO 80280-4020;

(d) **MARINE CORPS:** Headquarters, U.S. Marine Corps, Manpower and Reserve Affairs (MMSR-5), 3280 Russell Road, Quantico, VA 22134-5103;

(e) **COAST GUARD:** Commanding Officer (RAS), USCG Personnel Service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591.

SECTION I - MEMBER INFORMATION.

ITEMS 1 and 2. Self-explanatory.

ITEM 3. If you are retired from active duty, enter the date of retirement or the date of transfer to the Fleet Reserve. If you are a Reserve member whose eligibility for retired pay arises under Chapter 1223 of title 10, United States Code, enter either the date of your 60th birthday, or the later date on which you applied to receive retired pay.

ITEMS 4 and 5. Self-explanatory.

ITEM 6. Enter the address and telephone number (including area code) where you can be contacted.

SECTION II - BENEFICIARY INFORMATION.

This information is needed to determine SBP/RCSBP premiums and annuities at the time of death.

ITEM 7.a. Provide your spouse's name and requested information. Also, attach a copy of your marriage certificate. If you have no spouse, enter "N/A".

7.b. through 10. Provide the requested information about your spouse. In Item 10, if marriage occurred outside the United States, include city, province, and name of country.

ITEM 11. If you do not have dependent children, enter "N/A" in this item. If you elect coverage for your dependent children, provide the requested information and attach copy of birth certificate(s).

11.e. An incapacitated child is an unmarried child who has become incapable of self support before the age of 18, or after the age of 18 but before age 22 while a full time student. Documentation is required.

SECTION III - ELECTION OF COVERAGE.

NOTE: Election becomes effective on the first day of the month after the month it is received by your finance center or the Reserve Personnel Center for Reserve Members awaiting retired pay. You must live for 24 months from the effective date in order for the beneficiary to receive an annuity. If you die before the end of the 24 month period, all Open Enrollment premiums that you paid will be refunded to the beneficiary you elected.

ITEM 12. Complete if you fall into one of the following categories:

1. Retired from active duty and either:
 - a. declined SBP; or
 - b. elected spouse or former spouse coverage at less than the maximum level or child-only coverage.
2. Are a Reservist whose eligibility for retired pay arises under Chapter 1223 of title 10, United States Code, who:
 - a. elected RCSBP for a spouse or former spouse at less than maximum coverage or child-only coverage;
 - b. when notified prior to January 1, 2001 of eligibility to receive retired pay at age 60, either declined SBP or made no RCSBP election; or
 - c. when notified on or after January 1, 2001 of eligibility to receive retired pay at age 60, declined SBP or RCSBP.

12.a. through 12.f.

Persons not participating in SBP or RCSBP: If you are not participating in SBP or RCSBP, you may elect any category of coverage that you could have elected when you were first eligible to participate in SBP or RCSBP. However, if you were previously a participant and elected to discontinue coverage under section 1448a of title 10, United States Code, you are **not** eligible to participate in this open enrollment.

Persons currently participating in SBP or RCSBP with less than maximum spouse or former spouse coverage, or child-only coverage: If you have SBP or RCSBP coverage for a spouse or former spouse at less than the maximum base amount, you may increase that coverage up to your maximum base amount. You may also add coverage for a dependent child. In addition, if you have child-only coverage, you may add coverage for a spouse or former spouse or elect to increase your child-only coverage up to your maximum base amount. No other elections are available to you under this open enrollment period.

12.d. Initial if you are not married, or unmarried with one dependent child at retirement and have never married since, and desire coverage for a person with an insurable interest in you, and provide the requested information about that person in Item 14. An election of this type must be based on your full gross retired/retainer pay. If the person is not a relative, is a cousin or is more distantly related, attach evidence that the person has a financial interest in the continuance of your life. Under provisions of Public Law 103-337, you are permitted to withdraw from insurable interest coverage at any time. Such a withdrawal is effective on the first day of the month following the month the request is received by your finance center. There is no refund of SBP premiums collected before the effective date of the withdrawal.

12.e. and 12.f. Initial Item 12.e. if you desire coverage for a former spouse. Initial Item 12.f. if you desire coverage for a former spouse and dependent child(ren) of that marriage, and provide the requested information about these children in Item 11 as appropriate. Provide a certified photocopy of final decree of divorce that includes separation agreement or property settlement which discusses SBP for former spouse coverage. The DD Form 2656-1, "Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage," or Coast Guard Form CG PSC-4700, "Coast Guard & NOAA Retired Pay Account Worksheet and Survivor Benefit Plan Election," must be completed and accompany this form.

ITEM 13. You cannot decrease the level of coverage. If you have coverage based on full retired pay and add a category of beneficiary not previously covered (i.e., if you are adding your spouse to existing child-only coverage based on full retired pay), you may not select a reduced amount.

13.a. Initial if you desire coverage based on your full gross retired/retainer pay.

13.b. Initial if you desire coverage based on a reduced portion of your retired/retainer pay. This reduced amount may not be less than \$300.00. If your full gross retired/retainer pay is less than \$300.00, the full gross pay is automatically used as the base amount. Enter the desired amount in the space provided to the right of this item.

13.c. Initial if you are a current participant and desire to increase your base amount. Enter the desired amount in the space provided to the right of this item.

ITEM 14. Enter the information for insurable interest beneficiary and provide a copy of the birth certificate(s). (See Item 12.d. above.)

SECTION IV - REMARKS.

ITEM 15. Reference each entry by item number.

SECTION V - MARITAL STATUS HISTORY.

ITEM 16. Attach a copy of any marriage certificate, divorce decree or court order.

SECTION VI - ENROLLMENT PREMIUM PAYMENT INFORMATION.

Payments under this section are in addition to your normal monthly premiums. Refer to the Premium Tables to determine the total enrollment premium amount owed. Choose one of the three payment options provided.

NOTE: Make your check payable to DFAS-Cleveland Center, U.S. Coast Guard, or DHHS as appropriate. Write your Social Security Number and "SBP OPEN ENROLLMENT" on your check. Once your finance center receives your election, you will be notified of any amount owed. If you should desire to void your election, you must notify your finance center in writing within 30 days of being notified of the amount owed.

SECTION VII - MEMBER OF A RESERVE COMPONENT.

Members whose eligibility for retired pay arises under Chapter 1223 of title 10, United States Code, who did not elect Reserve Component Survivor Benefit Plan (RCSBP) after qualifying years of service, or elected RCSBP Deferred must complete this section. If you previously made a RCSBP election, attach a copy of your RCSBP election.

NOTE: If you desire to void this open season election, you must notify your reserve personnel center in writing within 30 days.

ITEM 18.a. Initial this block if you have elected Option B and would like to change to Option C. See Items 18.b. and 18.c. for more detail.

18.b. Initial this block if your last election was Option A. Option A defers a survivor annuity election or declines RCSBP coverage until age 60. By initialing Option B, you elect to provide a deferred survivor annuity to your beneficiary(ies) that begins on the 60th anniversary of your birth, or the day after your death, whichever is later.

18.c. Initial this block if your last election was Option A and you would like to change it to Option C. By initialing Option C, you elect to provide an immediate survivor annuity beginning on the day after your death, whether before or after age 60.

SECTION VIII - SPOUSE CONCURRENCE FOR RESERVE COMPONENT SURVIVOR BENEFIT PLAN ELECTION ONLY.

If you have no existing RCSBP coverage, Section 1448 of title 10, United States Code requires that an otherwise eligible spouse must concur if a member elects less than maximum coverage or elects child-only coverage. The spouse's concurrence must be obtained and dated on or after the date of the member's election. If concurrence is not obtained when required, maximum coverage will be established for your spouse and child(ren) if appropriate. The spouse and the witness must complete Items 19 and 20. The witness cannot be named as the beneficiary in Sections II and III, and cannot be the retiree.

SECTION IX - CERTIFICATION.

Read the statement carefully, then sign your name and indicate the date of signature. For your SBP/RCSBP election to be valid, you must sign and date the form.

APPENDIX X

Letter to DFAS regarding Registration of Survivor Benefit Plan Election for Former Spouse coverage:

August 17, 2006

Defense Finance and Accounting Service--London
Attention: Code: FRABA
P.O. Box 99191
Cleveland, OH 44199-1126

Re: Service Member: Service Member
Service Member's SSN: ***_***_****
Former Spouse: Ms. Former Spouse
Former Spouse's SSN: ###-##-####

Registration of Survivor Benefit Plan election for Former Spouse coverage

Dear Sir/Madam:

I represent Ms. Former Spouse (hereinafter also referred to as "Former Spouse"), the former spouse of the United States Navy <service member/retiree>, Mr. Service Member (hereinafter also referred to as "Service Member").

Enclosed please find the following documentation:

1. Copy of the parties' Decree of Divorce that has been certified within the last 90 days.
2. Copy of the parties' Domestic Relations Order (Military Retirement) that has been certified within the last 90 days.

And/or3. Agreement to Name Former Spouse Beneficiary under the Armed Services Survivor Benefit Plan.

CHOOSE ONE:

Designation by agreement of service member:

SURVIVOR BENEFIT PLAN
FORMER SPOUSE BENEFICIARY DEEMED ELECTION

Pursuant to the provisions of the Armed Services Survivor Benefit Plan (10 U.S.C. §1447, et seq.), and incident to the proceeding for divorce, Service Member has made a voluntary written agreement to name Former Spouse as a "former spouse beneficiary." The agreement has been incorporated in and approved by the enclosed Decree of Divorce and/or the Domestic Relations Order (Military Retirement), and Service Member was ordered in the enclosed decrees/orders to designate Former Spouse as a "former spouse beneficiary" under the plan. On behalf of Former Spouse, I am requesting that the designation the Court has ordered and to which Service Member has consented and agreed be deemed to have been made.

This request has been mailed to you within one year of the date of the signing of the enclosed decrees/orders.

SURVIVOR BENEFIT PLAN
FORMER SPOUSE BENEFICIARY DEEMED ELECTION

Pursuant to the provisions of the Armed Services Survivor Benefit Plan (10 U.S.C. §1447 et seq.), and incident to the proceeding for divorce wherein the Court ordered Former Spouse deemed designated as a "former spouse beneficiary." On behalf of Former Spouse, I am requesting that the designation ordered by the Court be deemed to have been made by Service Member.

This request has been mailed to you within one year of the date of the enclosed orders were signed.

I would appreciate your prompt acknowledgment of receipt of this letter and the enclosed documents. If further information is required, please let me know, and I will promptly furnish it to you.

I look forward to hearing from you in the near future.

Sincerely yours,

James B. Attorney

APPENDIX Y

**AGREEMENT TO NAME FORMER SPOUSE BENEFICIARY
UNDER THE ARMED SERVICES SURVIVOR BENEFIT PLAN**

As used hereinafter, the following terms apply:

SERVICE MEMBER means and refers to: Mr. Service Member

FORMER SPOUSE means and refers to: Ms. Former Spouse

I, Service Member, hereby acknowledge that at the present time Former Spouse is named as a spouse beneficiary under the Armed Services Survivor Benefit Plan and that Former Spouse should continue to remain as a beneficiary under that plan after the entry of the decree of divorce that makes her my former spouse. Therefore, I hereby voluntarily designate Former Spouse as a former spouse beneficiary under the Armed Services Survivor Benefit Plan and request that this agreement to do so on my part be approved and the Decree of Divorce [and/or Domestic Relations Order (Military Retirement)] signed by the Court in this cause, <Style of Case>, reflect this agreement. I further agree that I will not, following Former Spouse's designation as a former spouse beneficiary under my Armed Services Survivor Benefit Program after the entry of the Decree of Divorce and/or Domestic Relations Order (Military Retirement), during her lifetime, revoke, modify, amend, withdraw, or in any other form alter this election to designate Former Spouse as a former spouse beneficiary under the Armed Services Survivor Benefit Plan.

Executed in multiple originals on the date of acknowledgment shown below.

Service Member, SERVICE MEMBER

STATE OF TEXAS §
COUNTY OF BEXAR §

This instrument was acknowledged before me on _____, 200__ by Mr. Service Member.

Notary Public, State of Texas